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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

STEPHEN A. KOCZAK, KATHERINE E. ROTTER, and JOHN G. RESCH,
Appellants,

v.

G. DALLAS DIXON, THE MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE, JEFFREY LAURENTI, HOWARD KAYE, GERALD STOCKMAN, LOUISE LOMMA, JANE BURGIO, W. CARY EDWARDS, THOMAS H. KEAN,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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Jurisdictional Statement

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QUESTIONS PRESENTED

1. In the state of New Jersey, where county committees are created by statute and forbidden to endorse candidates before the primary, which is mandated by statute for the purpose of ending manipulation of the nomination process by certain select members of political parties, does a practice by a county committee's chairman and leadership of creating, staffing and operating a parallel county "central" committee with substantial overlapping membership for the purpose of holding screening and endorsing conventions and endorsing candidates prior to the primary violate federal constitutional rights of a non-insider candidate for the United States Congress and his voter supporters who do not participate in the circumventive endorsement process so as to create federal jurisdiction where the complaint alleges the above and other

similar facts and violations of Art.I, Secs. 2 and 4, the 1st and 14th Amendments and the following statutes: 28 U.S.C. 1331, 1343, 2201, 2202 and 42 U.S.C. 1983, 1985, 1986 and 1988 ?

2. May a district court ignore the allegations of a complaint and go beyond its face in considering a dismissal motion and thereby find a lack of federal subject matter jurisdiction by considering instead the merits of the case ?

3. Does the delegation of federal constitutional authority in Art.I, Secs. 2 and 4 to state legislatures to furnish the statutes whereby the regulation of races for the Natioal Congress is accomplished in the first instance insulate violations of such state furnished but federally created law from federal jurisdiction ?

4. May elected party officials, elected according to a statutory procedure, use their authority thus furnished by the

state to create a separate but overlapping private body to endorse candidates in a manner forbidden to them in their statutory committee without affecting fundamental constitutional rights of those negatively affected by such endorsements so as to confer federal jurisdiction upon the resulting cause ?

5. May a political party insider group who are statutorily elected state officials as well as party officials, clad with the authority of the state, claim the invalidity of a statute under their claimed First Amendment rights, obtain a judgment of dismissal insulating that claim from effective remedial action and thus pre-empt the statute in practical effect without creating a mandatory appeal to this court by virtue of such pre-emption ?

6. Does a district court abuse its discretion as set out in Rule 15.1(i) when

it makes no separate findings of fact and law as required by Rule 52 of the FRCP in refusing a preliminary injunction, goes beyond the complaint and the affidavits to the merits, makes findings not supported in the record, and generally violates the rule of U.S. v Corrick 298 US 435 (1936) and Mayo v Lakeland Highlands Canning Co. 309 US 310 (1940) ?

7. Where a district court refuses to use its equitable powers to stop an ongoing scheme which it admits may be illegal that circumvents a statute affecting federal elections and prejudices the fairness of federal elections, may it continue to refuse to interfere with the practice of questionable legality of circumventing the statute or shall it stop the violative activity pending a full resolution of the merits of the matter ?

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Appellants,

v.

G. DALLAS DIXON, et al.,
Appellees.

Jurisdictional Statement

I. THERE ARE NO REPORTED OPINIONS BELOW

II. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) THE NATURE OF THE PROCEEDING AND THE STATUTORY BASIS FOR JURISDICTION

(A) The Nature Of The Proceeding

Suit was brought by appellant Koczak and two appellant voters of his party, the Democratic Party of Mercer County, New Jersey. Appellant Koczak ran for the congressional nomination of his party. He and appellants Rotter and Resch wished his candidacy unburdened by inequalities violative of the Constitution. Plaintiff Koczak wishes the primary of his party relieved of illegal inequalities for his own sake as a candidate and also on behalf

of all candidates who are not part of the party inner machinery as well as for those in his party, (or who might join it) who wish to support and vote for him or any other non-insider candidate. Appellants wish that the fluidity of politics within the party which has been prescribed by the legislature may be declared and preserved. Appellant Koczak and his supporters claim a right under the 1st and 14th Amendments to emerge from the ranks as a candidate and challenge the established ideas of the party's present leadership in accord with the prescription of the legislature. Appellants wish to stop the practice of the leadership of the county party of endorsing candidates prior to the primary in violation of New Jersey statute N.J.S.A. 19:34-52, which forbids party committees to endorse so that all candidates in the party might be as nearly as practible equal in accordance with that

law.[1] Plaintiffs sought injunctions to stop the practice and damages.

Can there be evasion of the statute by use of another, overlapping committee of insiders formed outside the statutes that create party committees, in the manner of "jaybird" parties used in the South to maintain segregation,[2] without violating

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[1] N.J.S.A. 19:34-52 reads: "No state, county or municipal committee of any political party shall prior to any primary election indorse the candidacy of any candidate for a party nomination or position." Chapter 5 of Title 19 of the N.J.S.A. in turn sets out "PARTY ORGANIZATIONS" and, in Article 2 thereof, specifies how the membership of municipal, county and state committees will be elected and selected and how they shall be organized. Thus in New Jersey the political party organizations are creatures of statute and are regulated in their state function of selecting candidates in the primary to assure fair, democratic elections. In addition to being forbidden to endorse any party member as against another in the primary, the party organizations are forbidden to finance any primary candidate against another. N.J.S.A. 19:34-33.

[2] See Terry v Adams, 345 US 461 (1953) wherein evasion of federal constitutional requirements by use of a more restricted, unofficial "pre-primary" before the official primary was given the "jaybird" label in constitutional jurisprudence.

fundamental rights which are secured for primary candidates for Congress and their voter-supporters by the Constitution ?[3] The trial court denied injunctive relief and dismissed for want of jurisdiction and was affirmed without comment.

(B) Statutory Basis For Federal Jurisdiction

is found in (Ap 8-3), 28 U.S.C. 1331, 1343, 2201, 2202 and 42 U.S.C. 1983, 1985, 1986, 1988 in that rights are infringed which are secured by Art.I, Secs.2 and 4, Art. VI, C1.3 and the 1st and 14th Amendments. These include equal protection rights, due process rights, freedom of

[3]While the brief was in process, the Court handed down its opinion in Tashjian v Republican Party of Connecticut, Opinion NO. 85-766, Decided December 10, 1986, in which the majority, discussing primaries, said: "The constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is applicable to every stage in the selection process." This surely includes a pre-primary convention, as here, which, by screening and endorsement, substantially affects or alters the selection process. Otherwise the constitutional goal could be evaded.

association, and petition for redress.

The 1st and 14th Amendment rights are straightforward, though ignored below. But rights asserted under Art.I, Secs.2 and 4, though articulated by this Court long since, are detailed here since the district court treated them obtusely in its opinion and comments. They create federal law which is effectuated through statutes furnished by the fifty states.

In most part congressional races are regulated by prescriptions of the state legislatures, all of which are coincident with the laws regulating races for state office. This is because legislatures have, without exception, commingled this delegated federal authority with their authority to regulate the times, places and manner of electing their own, state officers and legislators. They have, in each instance, used both authorities to prescribe one set of laws that governs

both state elections and those for the National Congress.[4]

In 1884, Ex Parte Yarbrough, 110 US 651, held that Art.I, Sec.4 adopts State qualifications as a federal qualification for the voter; but his right to vote is based upon the Constitution and not upon the State law, ibid. p. 652. The office of member of Congress, "is created by th[e]...Constitution and by that alone." Art.I, Sec.2, adopting qualifications prescribed by the state legislatures for the electors of the most numerous branch of the state legislature, "adopts the qualification thus furnished as the qualification of its own electors for members of Congress." ibid. p. 663. [emphasis added]. The state legislature

[4]Congress has exercised the overriding authority which was withheld for it in the clause in the matters of election from contiguous districts, a uniform national date for general federal elections and in acts designed to limit or prevent corruption in congressional races.

prescribes pursuant to the authority delegated by Art.I, Sec.4 and, in so doing, furnishes the qualifications, but the legislature does not create the coincident law governing federal races, the federal Constitution does. idem.

So here, the same constitutional delegation of power in Art.I, Sec.4, creates the law regulating endorsements as part of the times, places and manner of electing members to the U.S. House, but the New Jersey legislature, pursuant to that delegation of authority, furnished the anti-endorsement statute, N.J.S.A. 19:34-52, that is applied to the federal as well as the state legislative races. The New Jersey statute as applied to the race for the House in the fourth district is thus federal law though not a federal statute. The candidate and his supporters have as much right to federally enforce a prescription of the state legislature

banning endorsements before the primary in New Jersey, (and hence pre-selection by a screening and endorsing convention) as they do the prescription furnished by the state legislature for the qualifications of electors of the most numerous branch of that legislature to qualifications for electors for members of the U.S. House.

Yarbrough has never been overturned, though there is an instance of subsequent dicta which, if read carelessly, might seem contradictory, but does not stand up as such under close analysis.[5]

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[5] Shoshone Mining Co. v Rutter, 177 U.S. 505 (1900) deals with possessory rights. In making the point that federal statutes establish the staking out of mining claims on federally owned lands by the use of local mining law, and thus spin part of the government property off into private possessory rights, the Court allowed as how Art.I, Sec.2 did not, by adopting the prescription of each state legislature for the qualifications for electors of the "most numerous branch" thereby make that prescription federal statutory law. This is true as far as it goes--if you want to analogize voters to exploitable minerals. (Plaintiffs contend that defendants wish to preserve a habit of "exploiting" the non-insider members of the party more than

Thus "The power...arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States." id, 662. The Framers chose state statutes to furnish the regulation of the federal races to accomodate the local regulatory scheme governing other elections in each state, so that they are, to the extent that they regulate federal races, delegated federal law that secures federal rights and are furnished by legislatures with intent to

(Cont.)
the legislature wishes.) It's true that such federal delegation of power does not make the resulting statutes furnished by state legislature part of the U.S. Code. But voters' rights cases since 1900 make it clear that voters' qualifications set by the legislatures and secured by constitutional provisions give rise to federal jurisdiction, affirming Yarbrough and repudiating any such extension of Shoshone beyond the realm of private possessory rights that are "spun off" from government ownership into the private sector. (Unless, of course, defendants would urge the revival of Dred Scott v Sandford, 19 How. 393 (1857) with particular application to insider control of the party's rank-and-file.

protect both state and federal rights. The systematic violation of them as they apply to federal races, as here, infringes upon federal rights which are secured by authority in Art.I, Secs.2 and 4.

It was unnecessary to repeat the exegesis in Yarbrough about the federal origin of this authority of the state legislatures and it was later held that these constitutional provisions directly secure federal rights when invoked via the federal civil rights statutes. United States v Classic, 313 US 299 (1941) held the right to vote for a federal officer, whether or not it be deemed a privilege of citizens of the United States[6] is directly secured by Art.I, Secs.2 and 4. Id.at 314-5, cases cited. Snowden v Hughes, 321 US 1,n.3 (1944). In Smith v Allwright, 321 US 649 (1944), Art.I, Secs.2 and 4,

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[6] as opposed to privileges of citizens of the several states, see Twining v New Jersey, 211 US 78, 97.

were used and jurisdiction established and have since been routinely invoked. The invocation of these provisions is via the predecessors of the civil rights statutes used here.[7] Even absent the 1st and 14th Amendment claims, federal jurisdiction would be established by the Art.I claims.

(ii)DATES BELOW

Complaint filed May 9, 1986. Hearing May 12. 2d hearing May 21; injunctive relief denied, dismissed (no federal jurisdiction) order to be drawn up by defendants; no opinion. With order still undrawn, plaintiffs petition for single justice relief; denied, Brennan, Stevens, JJ., May 29, 30. Meanwhile (per Clerk's office) stay and emergency relief sought

[7] In Yarbrough, e.g. reliance was upon then Rev. Stats. 5508 and 5520 in conjunction with the same constitutional provisions invoked here, which have been unchanged since 1787. Today these statutes are codified, with slight revisions, as 42 U.S.C. 1985 (c). In Smith, supra, the statute invoked, then 8 U.S.C. 43, is today codified as 42 U.S.C. 1983.

in district and appeals court. Results in 3d hearing May 30; district court affirms, dictating an opinion for the first time, per request from 3d Circuit delivered by counsel. Request for stay and emergency relief in 3d circuit denied. Order from district court Jun 2. Notice of appeal May 27, relying inter alia on Davis v Bandemer 106 US 2797, dec. Jun 30, 1986; brief filed 3d Circuit Aug 1. Sep 30, 3d Circuit affirms; no comment. Emergency preliminary relief, with stay, applied for Oct 10, to Brennan, J. On a (by then) standing order from Brennan,J., stay and emergency relief applied for in 3d Circuit Oct 15, denied Oct 22. Application to Brennan, J., denied Oct 22. Oct 28, referred to Chief Justice who refers it to Oct 31 conference; denied without comment, Order issues November 3. Notice of Appeal filed in the 3d Circuit Dec. 22.

(iii) THE STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT

is 28 U.S.C. 1254 (2). Why appeal and not cert ? The answer, as in the parallel case of Hopfmann v Connolly, No. 85-1094, (pending 10 mos.,) is the pre-emption rule of Malone v White Motor Corp., 435 US 497.

Ultimately the claim of the defendant party officials and insiders that they may evade the statutory ban on pre-primary endorsements by party committee is based on an alleged First Amendment right. To see this it is only necessary to examine their contention that they may hold an endorsing convention despite the statutory ban in light of existing state law. It is then seen that the device of evading the statute with an overlapping unofficial committee violates established state law and therefore violates the federally created application of that law to federal races. The contention to the contrary is is seen to be merely a tactical "smoke screen." The purpose of this subterfuge

is revealed as a tactical maneuver when it is considered that the defendants raised no issue of abstention at the district court level, threby waiving it, only to attempt to raise it de novo on appeal.

That a "jaybird" committee violates N.J.S.A. 19:34-52 is clear from examining the entire statutory scheme to see the context of the statute. It's more evident yet if we look at the way this "jaybird" practice developed in conjunction with leading case law:

In 1903 New Jersey enacted statutes that have now become Title 19, regulating electoral activity, including political parties as a key component thereof. This statutory scheme established, inter alia, that all party nominations for state and federal offices would be by primaries in which all members are free to participate. Under this scheme political parties, as they relate to the electoral function,

were created by statute; nominations by caucuses and/or conventions were ended. A 1909 amendment provided for election at the primary to state, county and town committees. Later amendments in 1930 reinforced the overall intent by adding the anti-endorsement statute at issue and also the prohibition upon the financing of any primary candidacy by party committees.

In 1971, in the face of this statutory scheme, certain select members of the statutory MERCER COUNTY DEMOCRATIC COMMITTEE, predecessors of the present defendants, formed the unofficial committee, the MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE, whose purpose is set out in its rules, section 12: (Ap 8-51)

> "The purpose of the Central Committee is to endorse candidates for county, state and federal offices in the Democratic Primary in Mercer County, to the extent permitted by law. Unendorsed candidates may be entitled to run in the same column with the endorsed candidates but may not use the same slogan. The Committee shall adopt such rules as it deems necessary to accomplish the purpose with full

and fair consideration for all potential candidates."

Significantly, the phrase: "to the extent permitted by law" wasn't in the 1971 rules but is an amendment. Between 1971 and the date of this amendment, a leading decision held that evading the anti-endorsement statute by similar committees is illegal, a holding reinforced by other opinions. In Cavanaugh v Morris County Democratic Committee, 121 NJ Super 430, 435 (Ch Div 1972), a practice of having a subcommittee screening and endorsing candidates in the manner forbidden to full committees was struck down. Citing equity and substance, the court found the no-endorsement statute had a "great public purpose" and had been passed due to "public dissatisfaction with the political manipulation at conventions." It held "The major reason for changing to the primary election is to prevent political manipulation by certain select members of the party."

The defendants use a like evasive device, a "side-by-side," overlapping committee rather than a subordinate overlapping committee. This parallel but statutorily unauthorized committee meets each election year before the primary and endorses favored candidates, screening out other candidates. The names of endorsees are conveyed to the officials who decide upon ballot access, placement and slogans. (Each candidate may choose a slogan of 6 words or less to be placed next to his name on the ballot. N.J.S.A. 19:23-14 through 17 and 19:49-2.) Candidates may group together on ballots ("bracketing") based on "philosophy," devotion to the same "issue," or by "faction" within the party. The county chairman is chair of both official and unoffical committees. He thus places the imprimatur of the party's endorsement upon the endorsees chosen by the conventions and communicates it to the

county ballot officials who assign the top or "party" line to the party endorsees and allow them to choose slogans to make it clear that they are the "organization's" endorsees. The central committee rule 12 make it clear that controlling an official line and slogan for the endorsees is part of the committee's screening and endorsing purpose. Ap 8-51.

No attempt has been made, over the years, to communicate to the public that this endorsement which has such a strong effect is by a committee which is outside the lawful party electoral structure as established by statute and no attempt has been made to communicate that the central committee is a device to allow the party insiders to do as a committee what the statute bars. Defendant party officials hold out to the public that their actions in both committees, without distinguishing between them, are official party actions.

Thus they hold out, including to their own rank-and-file, their authority derived from the state's creation of the official, statutory county committees as apparent authority for the actions of the "jaybird" defendant CENTRAL COMMITTEE and act, in all respects, as if the central committee were clad with the authority of the State.

Deamer v Jones, 42 NJ 516 (1964) held courts will enter intraparty disputes in two instances: 1) when there's "violation of a controlling statute." and 2) where there's "infringement of a clear legal right." The case also established that in determining whether a particular situation is one or both of these, it is considered that "Political parties function through their county committees, and the members and chairmen of these committees are in a sense trustees of the party interests for the registered voters of the party in the county." So that under New Jersey law

there's no place for "jaybird" committees and there's a fiduciary or quasi-fiduciary obligation of committee members not to take part in such a device.

In Formal Opinion 1977 -- No. 9, the state Attorney General (not the present defendant,) said:

> "organizations similar to the Candidate Screening Committee in Cavanaugh are prohibited, under N.J.S.A. 19:34-52, from endorsing candidates prior to the primary election....Individual members of a party committee are not subject to a similar prohibition on pre-primary endorsements--the emphasis on members qua members being on the individual right of free expression under the First Amendment to the Constitution of the United States. Where such committee members consort to individually and collectively endorse a candidate, it seems clear, however, that the alter ego doctrine of the Cavanaugh opinion would prohibit such activity."

In a passage of particular importance because these defendants are, at bottom, trying to pre-empt the statutory scheme of nomination by primaries so they may "steer" or select candidates at a closed

convention, the opinion pointed out that Rogers v State Committee of Republican Party, 96 NJ Super 265 (Law Div 1967) established that:

> "selection of candidates for office is to be accomplished by the primary vote, not by political committee."

Three state Supreme Court cases reinforce this: Sadloch v Allen, 25 NJ 118 (1957); Kilmurray v Gilfert, 10 NJ 435 (1952); and Stevenson v Gilfert, 13 NJ 496(1953), and, as said in a later case, "instruct us that the public interest, as it is served by the multiparty political system, is a lodestar to the construction of Title 19," not the interests of a party inner group. Hand v Larason, 163 NJ 68 (Law Div 1978). It holds even where there is no "clear express statutory prohibition which would preclude" the challenged conduct, that "...the election laws must be read in pari materia; therefore, their intent must be gathered from the whole of the context."

So it can be seen that the use of the central committee to evade the statute's ban on endorsements is illegal under state law. Understanding that here enables the Court to see that the real reliance of the defendants-appellants is upon an alleged 1st Amendment right of speech and assembly which is asserted in an attempt to pre-empt the statutory scheme so as to allow a screening and endorsing convention as a matter of federal constitutional right. Hence the Malone pre-emption rule applies.[8]

Counsel for defendants Dixon and the County Committee explained it: (Ap 17-39)

> "The only entity that is regulated by 19:34-52 is the Mercer County Democratic Committee. If politicians

[8] Thus (Ap 36-19) counsel for defendants G. DALLAS DIXON, the chairman of both the official and "jaybird" committee, and the man out of whose law offices the insider organization actually operates in both its guises, and the COUNTY COMMITTEE, goes on at some length about the First Amendment rights of the insiders, comparing them, somewhat disingenuously, to the League of Women Voters.

in this county or activist democrats or a combination of the two get together to support candidates from a primary election they have a First Amendment right under the United States constitution to do that.

...

"And what plaintiffs here are trying to do is paint the supporters of Chairman Dallas Dixon, and activist Democrats and the Mercer County Democratic committee with the same brush and that is simply inappropriate because the statute doesn't say that active democrats may not meet to discuss political issues or endorse candidates. That would be a violation of constitutional rights. It says the county committee that is set up by statute may not meet,..."

Leaving aside the misrepresentations of plaintiffs' positions and allegations, we see that these defendants are challenging the statute on federal constitutional grounds.[9] Hence mandatory appeal lies.

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[9]This point was made in the brief of these defendants, viz: "defendants are prepared to set forth a claim that the statute violates the First Amendment of the United States Constitution if it is contended that the statute prohibits the activities of the Central Committee." I.e. they'll defer it if they can in order to shop the state forum, but ultimately the contention is that the by-laws of the central committee pre-empt the statute under constitutional right.

An illegal, unconstitutional private law-making power is being asserted disguised as a First Amendment freedom. The state legislature, elected by all the people, has decreed nomination by primary. The party inner elite has decreed de facto nomination by an "endorsing and screening" convention. The decrees aren't compatible and one must, of necessity, pre-empt the other. What we have is an attempt by the defendant party insiders and officials to pre-empt the statute with the collusion of the defendant state executive officials on spurious First Amendment grounds. They thus insert into the process the very "political manipulation by certain select members of the party," which, according to Cavanaugh, supra, the primary was adopted to prevent and thus arbitrarily arrogate unto themselves to override the "public dissatisfaction with the political manipulation at conventions" which that

court found was the reason for enactment of the ban on endorsements. They do this while attempting to deny jurisdiction to plaintiffs, as representatives of the thus disenfranchised rank-and-file that votes at the primary, to correct the matter in the federal courts with regard to the races for nomination for the National Congress. It is a subterfuge to evade federal jurisdiction. Radio Station WOW, Inc. v Johnson, 326 US 120, 129, and we urge this Court to recognize it as such.

STATEMENT OF THE CASE

Parties

Plaintiff-appellant STEPHEN A. KOCZAK is (plaintiffs maintain the primary election is void for unconstitutionality) a candidate for his party's nomination to the House for the Fourth District. Ap 8-3 The other plaintiffs-appellants, KATHERINE E. ROTTER and JOHN G. RESCH, are ordinary rank-and-file members of the Democratic

Party. Ap 8-4,5 None is a member of the defendant committees or has held or holds any party or elected office. None of them have previously run for such office. All are non-members of the party organization that steers the endorsements complained of. Ap 8-1-5,30-32[10] Plaintiff KOCZAK recently returned to his boyhood home in Trenton, in the district, where he lived till he was 21, after an absence of years during which he attended Harvard, served in the military and foreign service (much of the time overseas) and then worked for private organizations. During the last part of this time away from the area, after voting absentee for many years, his voter registration was in Washington, D.C.

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[10] In the 3d circuit a Rule 12 motion supported by affidavits is in effect one for summary judgment under Rule 56 and will be treated as such. Thermo-Plastics Corp. v International Pulverizing Corp. (DNJ 1941) 42 FSupp. 408, 5 FR Serv 12f.11, Case 1. See Moore's Federal Practice, Vol 2A, par. 12.09,n.13 for a roundup of cases in most circuits supporting this view.

He wasn't in the district when the illegal practices complained of were instituted.

Defendant-appellee G. DALLAS DIXON is a Mercer County Democrat who is a party "insider." He heads the organization of the party. Ap 8-6[11] He is chairman of both defendant committees. Ap 8-5,6,7 He practices law in Trenton and runs the committees out of his law office, making no effort to inform the public that there are two and not one, or that the central committee exists for the sole purpose of

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[11] The plaintiffs have so pled. In Frederick Hart & Co. v Recordgraph Corp. (CCA3d 1949) 169 F2d 580, 7FRD 43, 11 FR Serv. 56c.41, Case 12, the 3d Circuit reversed where the dismissal of a complaint was based on affidavits supporting the motion and ignored the facts pleaded. Judge Kalodner said: "An affidavit cannot be treated, for purposes of the motion to dismiss, as proof contradictory to well-pleaded facts in the complaint." See Moore's, supra, loc. cit., p. 2296, n.18. No doubt this or other similar contentions close to the heart of the issue will be contested, but since discovery wasn't reached, the contentions of the plaintiffs have to be accepted for purposes of this appeal and should have been so accepted by the lower courts.

doing that which the authorized committee is forbidden by law to do. Ap 8-21-23[12]

Defendants-appellants MERCER COUNTY DEMOCRATIC COMMITTEE and MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE are the authorized and unauthorized committees referred to above, respectively. They've

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[12]Here again, there might be contention as to facts. But Judge Maris early laid it down in the 3d circuit that on a motion it is "no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried....All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for...judgment." Toebelman v Missouri-Kansas Pipe Line Co., (CCA3d 1942) 130 F2d 1016, 1018, 6 FR Serv 56c.41, Case 7. This was reaffirmed in Sarnoff v Ciaglia, (CCA3d 1947) 165 F2d 167, 11 FR Serv 56c.41, Case 1 and it was held there also that the trial court cannot resolve issues of credibility on the basis of conflicting affidavits. See Fairbanks, Morse & Co. v Consolidated Fisheries Co., (CA3d 1951) 190 F2d 817, 824, 15 FR Serv 56c.41, Case 14. (Staley, J.) See Judge Freeman's opinion in Season-all Industries, Inc. v Turkiye Sise Ve Cam Fabrikalari, S.A., (CA 3d 1970) 425 F2d 34, 39. Of course, the 1963 amendments to the federal rules allowed affidavits, when there is no issue of fact, to cut through pleadings, but where there is contention the burden is still very much on the movant.

the same chairman and officers; 55% of the central committee are also members of the county committee. Ap 8-7-11; 8-22-23;8-40 Defendant DIXON and the other officers of the central committee hold the posts, id. because of their positions on the county committee. The committees operate out of the same offices, adjacent to those of defendant DIXON, on a day to day basis. The same person, defendant LOUISE LOMMA, does the administrative work for both. Ap 8-13 Defendant DIXON, by the central committee rules, appoints 25 of its 194 members. Ap 8-40,41. He also controls its agenda and meeting calls. Ap 8-45-53 The county committee's members are selected at the primary pursuant to statute. Ap 38-15 Central committee members are chosen by its self-promulgated rules. Ap 8-40 By its rules its purpose is to screen and endorse candidates (Ap 8-51) as it has done each election year. This year it endorsed defendant LAURENTI. Ap 8-9

Defendant JEFFREY LAURENTI is a Mercer County Democrat who ran for his party's nomination for the fourth district seat this year. The central committee endorsed him at its Apr 2 endorsement and screening convention. No other members vyed for the endorsement (unbeknownst to plaintiff KOCZAK at the time.) Ap 8-11-13 Ap 11 Defendant LAURENTI held out to the press and public that he was the endorsee, not making an effort to clarify that he was the endorsee of an unofficial committee and that endorsements by party committees are forbidden by law. As a slogan on the ballot, he used: "Regular Democratic Organization" thus "bracketing" his name and slogan on the "party" line with the candidates using a slogan "Official Regular Democratic Organization." Ap 32,33,35 The "organization" thus named is intended as and is that of defendant DIXON, embracing both the official and unofficial committees. Ap 8-21.

Defendant GERALD STOCKMAN is a Democratic Party insider who is a state senator. He is a member of the central committee but not of the county committee. He nominated defendant LAURENTI at the unauthorized convention of the central committee. Ap 8-12

Defendant LOUISE LOMMA is a member, employee, and secretary of the defendant county committee. She is a member of the central committee also and administers the day-to-day business of both from offices next to those of defendant DIXON. Ap 8-13

Defendant HOWARD KAYE is a member of both defendant committees and is chairman of the "Credentials Committee" of the defendant central committee. Ap 8-14

Defendants JANE BURGIO, W. CARY EDWARDS and THOMAS H. KEAN are Secretary of State, Attorney General, and Governor of New Jersey, respectively. They are responsible for administering and enforcing the election laws. Ap 8-14-17

Development of the Cause of Action

Earlier this year, certain active (but then non-candidate) Democrats, including Mrs. Gertrude Dubrovsky, a member of a town committee and the central committee, sued to stop the illegal endorsements. Gertrude Dubrovsky, Joan Forscher and Joseph O'Neill v. Mercer County Democratic Committee, Superior Court of New Jersey, Chancery Division, Mercer County, Docket No. C-86-0068E, Hon. Paul G. Levy, JSC. The case pends and there is no opinion or law in the matter at this time. Judge Levy denied preliminary relief on the grounds that the central committee, if it had at the most, a 55 % overlap with the county committee, was not a true "alter ego" of the latter. Defendants here argue that this implies the necessity of close to complete one-to-one correspondence and congruence before such "alter ego" that would violate the statute could be found.

When plaintiff-Appellant candidate, returning to Trenton, decided to seek his party's nomination for Congress, he read the statutes and the material handed out by the offices of the Secretary of State. Having done so he believed endorsements were outlawed and did not know of this practice of endorsing by a committee claimed to be separate. Ap 11 (Subsequent research in the State's newspapers has revealed that the controversy has surfaced around the state from time to time and that the attempts to evade the statutory scheme are recognized. See, e.g., the Newark Star-Ledger for February 1, 1981, wherein it was concluded that after the suspension of the anti-endorsement statute for a few years had lapsed, "The county committees and their chairmen returned to methods devised to getting around the

endorsement prohibition.")[13] It is clear from the press that party-organization-neutral selection of candidates at a primary as intended by the legislature was not honored by many insiders in recent years. Plaintiffs learned of the practice when they read of the Dubrovsky litigation in the papers of April 3, 1986. Ap 11[14]

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[13] Or see the Trenton Times of Sunday, April 27, 1980, p.C7, the article: "Carabelli back in fold: Tighue says he's ignored." This article openly states that "Mercer County Democrats picked" a candidate to be their nomminee at an insider convention (which now turns out to have been the meeting of the central committee.) It also tells about how the convention "fenced out" another candidate. The endorsement, in the article, is called the "organization nod." Defendant Laurenti, then the Trenton Democratic Committee Chairman and executive director of the state Senate, is quoted as saying how the then county chairman, in a break with then recent tradition, "allowed a number of local leaders to arrive at their own consensus" on a candidate. He then is quoted in the article as speaking of the selection of the party's candidate as being the selection of the party's executive committee the preceding Monday. See the extensive file of clippings attached to the petition of plaintiffs to the Court on Oct 22 that was referred by the Chief Justice to the full Court for the Oct 31 conference.

When her case came to his attention in the press, plaintiff KOCZAK contacted Mrs. Dubrovsky and inquired into the matter, attending the subsequent hearings on the motions for preliminary relief in her case. In that proceeding a counsel for defendants who also appears here raised the argument that N.J.S.A. 19:34-52 was unconstitutional under the First Amendment freedoms of speech and assembly and was therefore void, asking permission to expound upon the matter further. At the hearing, however, on April 22, 1986, the

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[14] This Court should note: plaintiffs' allegation that the existence of the subterfuge of the unauthorized central committee had been in use for several years was seized upon by defendants below to claim that plaintiffs had knowledge of the practice for several years, ignoring the difference between existence and scienter. The two are not the same. It is of the essence of a scheme such as the one complained of that what is truly going on be kept obscure and within the "certain select members"[15] perpetrating it as much as possible. The court below favored this misrepresentation and it will likely be tried here, however immaterial, ignoring the allegations and sworn affidavits of the plaintiffs and the case law.

county court avoided the constitutional contentions and declined to stop the illegal endorsements as stated. As the judge saw it, a 55% overlap in membership by itself did not show "alter ego"-ness. Then the plaintiffs brought this suit.

Plaintiffs sued under Art.I, Secs. 2 and 4 of the Constitution as set out in the discussion of bases for federal jurisdiction above and also under the 1st and 14th Amendments. Plaintiffs seek a declaration that the endorsement practice violates these constitutional provisions and the applicable laws, injunctions against defendants to cease carrying out and condoning the practice of endorsing in violation of the Constitution and laws, and damages for the advantage illegally gained in violation of the Constitution. Plaintiffs moved simultaneously for relief restraining defendants immediately from further endorsement activity including use

of the said slogan for defendant LAURENTI. The primary was then a little over three weeks away. Defendants opposed, raising issues of lack of jurisdiction, failure to state a claim upon which relief can be granted, laches, inconvenience and, under Cavanaugh, lack of "alter ego."

Defendants DIXON and the MERCER COUNTY DEMOCRATIC COMMITTEE moved to dismiss on grounds of lack of jurisdiction prior to the hearing on the injunctive relief. Ap 13 Injunctive relief was denied and the matter was dismissed upon grounds of lack of jurisdiction, with a comment by the judge that were he a state court judge he would dismiss based on laches, observing that plaintiffs had no chance of success on the merits because of no jurisdiction. After denial of emergency and preliminary relief as noted (in effect a rehearing reaffirming with an opinion dictated into the record at the request of the 3rd

circuit), appeal was pursued. There the two last defendants raised an abstention doctrine argument not raised below.

STATEMENT OF WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

The jurisdiction of Federal courts, where it depends upon the character of the cause, embraces "all cases in law and equity arising under the Constitution and laws of the United States." This extends jurisdiction to all cases described, without making in its terms any exception whatever and without any regard to condition of parties. Cohens v Virginia (1821) 19 US 264; Ableman v Booth (1859) 62 US 506. It extends it to large classes of cases determined by character of the parties or natures of the controversy. Ex Parte Yerger (1869) 75 US 85.

The district court found that it "does not even have jurisdiction in the matter." Ap 1-5 The court did not "see" any

"subject matter jurisdiction." Ap 1-4 Although the opinion surrounds this finding with one of a failure to state a claim, an extrapolated state court finding of laches, and one of lack of connection between the act of endorsement complained of and the slogans and arrangement of the primary ballot, the court stated elsewhere in the record that it based the decision solely on the jurisdiction question. In the May 21 hearing, at which there was no formal opinion, even though the court allowed in and commented upon a number of substantive matters, it stated at the end:

> "Lastly, I am not in any way passing on the merits of the plaintiff's complaint....my dismissal is totally without merits, and it is for the jurisdictional reason which I have expressed." Ap 17-86

The court reaffirmed this in the May 30 hearing[15] in summing up its reaffirmation of the earlier decision.[16] The court then noted that it had made an oral decision from the bench in the earlier hearing and asked why it should not just reaffirm that. Plaintiffs' counsel informed the court that the appeals court had requested a formal opinion (Ap 36-42) which would enable review and the court dictated one, which makes the lack of explanation or analysis of the jurisdiction question in that opinion all the more striking.

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[15] In the last part of the May 30 hearing, the court, when pressed by defendants to make further finding on the merits, said: "I really didn't read the merits of it in the first place. I just want the record to be very clear and I appreciate your argument. I am not agreeing or disagreeing with what you said. I just never considered it in that way, quite frankly. I never considered the merits."

[16] "As a matter of fact, having had additional time to study it, I was rather rushed last time, I am more confident now than I even was on the first go 'round that my original decision was legally proper, that is to say, that this Court has no jurisdiction to hear and determine this matter." Ap 36-41

The opinion demonstrates a confusion between the jurisdictional issue and substantive issues. E.g., in denying plaintiffs preliminary relief, the court said: "Not only is there not a likelihood of success on the merits, but quite frankly, there is no likelihood of success, since the Court does not have jurisdiction in the matter." Ap 1-5 This follows a finding that plaintiffs "may have a claim under state law." Ap 1-3 In other words, likelihood of success on the merits, with regard to plaintiffs motion, was ruled against based on the unexplained jurisdictional decision. This will be discussed more fully below, but it illustrates confusion in the mind of the court that is evident throughout.

Rather than explain the jurisdictional decision, the court misrepresented plaintiffs' case as a state law matter, viz:

> "The essence of the plaintiffs' complaint is that the Mercer County Democratic Central Committee is the alter ego of the Mercer County Democratic Committee and since New Jersey Law forbids and prohibits the latter from endorsing primary candidates, it may not do so through the former." Ap 1-2,3

This is rather like saying that the question of whether or not one human being can own another is a matter of local law of property only, see Dred Scott, supra. It ignores the federal constitutional allegations of the complaint as if of no moment even though the court clearly, from its comments, perceived the substance of at least the 14th Amendment claims. Ap 17-44,45,46 It is of the essence of the complaint that, regardless of whether there might be some technicality which would allow the central committee to endorse (or more likely a friendly state forum to allow them to get away with it), that it does so violates the 1st and 14th Amendment rights of the plaintiffs as well

governed by the no-endorsement law which the legislature has prescribed pursuant to its delegated federal authority under Art.I, Secs.2 and 4. The unconstitutional inequality resulting would not be cured by any such evasive technicality even should there be one. And the authorities reveal clearly that there is not one at present.

The defendants, however they may dissemble, rely upon authority and color of state law to give their endorsement weight. The state creates and finances the primary and it creates the party committees that are forbidden to endorse and finance as between party members. If defendants were not clad with state authority by their official, publicly elected party positions and status, their use (or condonation by neglect) of a "jaybird" endorsing system would not have the effect of official endorsement complained of. If they truly were like

the League of Women Voters, as defense counsel disingenuously suggests, then their endorsement would not be the endorsement of the party. The inequality in voting weight as between insiders and outsiders they create by having an insider endorsing and screening convention in defiance of the statutory scheme, the impingement upon the associational rights of non-insider candidates and their supporters which they create by materially weighting a "pre-selection" of candidates, their bypassing of the right of citizens to have their elected representatives in the legislature determine these matters, their "de-democratizing" of the candidate selection process, all these things would not have the weight and effect that they have of, as the court below so candidly put it, "steering" the system.[17]

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[17] "THE COURT: Oh, I understand that, that your client was an outsider and that inner group was steering it, but whether he is an outsider or an insider, everyone knew

An officer clad with authority by the state cannot as a means of doing wrong forbidden by the 14th Amendment or any other part of the Constitution, proceed upon the assumption of possession of state power, and at the same time, for purpose of evading application of that amendment or another constitutional provision, deny the power (i.e. claim to be just private citizens exercising 1st Amendment rights) and thus accomplish the wrong, where, for purpose of enforcing rights guaranteed by that Amendment (or any other provision) when it is alleged that state officer, in virtue of state power, does acts which, even if permitted, (as here by neglectful acquiescence) prima facie would violate the amendment (or other provision). Home Tel. & Tel. Co. v Los Angeles (1923) 227 US 278. The Home Tel & Tel test is that

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how the system worked, whether it was working legally or illegally. Everyone knew how this system was working."

the question of federal subject matter jurisdiction under such 14th Amendment claims is to assume that the officer possessed the requisite color of state authority if there would not be the opportunity to perform the act but for possession of some state authority. id.

One may argue that the intertwined rights of voters and candidates espoused by plaintiffs here fall under Yarbrough; U.S. v Classic, and Smith and progeny, as plaintiffs do, or one can say that such rights are determined by Shoshone and law governing the privatization of exploitable government resources, as defendants do, but the debate entails substantial federal questions. That laws governing House races are entrusted by Art.I, Sec.4 to the legislatures in the first instance doesn't rob the questions of their federal nature.

Federal jurisdiction exists because there is no way to decide the contentions

raised here by plaintiffs in the complaint without deciding federal constitutional issues. Gold-Washing & Water Co. v Keyes (1878) 96 US 199; Tennessee v Davis (1880) 100 US 257; Railroad Co. v Mississippi (1880) 102 US 135; Pacific Railroad Removal Cases (1885) 115 US 1; Starin v New York (1885) 115 US 248; Germania Ins. Co. v Wisconsin (1886) 119 US 473; Bell v Hood (1946) 327 US 678. Three members of the Court have held that where this type of 1st and 14th Amendment claim involves only state races there is a substantial federal question. Bellotti v Connolly (1983) 103 SCt 1510.[18] Later, under the

[18] Stevens, O'Connor and Rehnquist, JJ., in dissent, ("substantial, unresolved questions regarding the accomodation of competing First Amendment values; the interests of would-be candidates and voters in eligibility for the ballot, and the interests of party members in political association..." id 1510 "Unquestionably the issues presented by these appeals are substantial." id 1517 The dissenters agreed with the Massachusetts Attorney General that allowing parties to set rules for ballot access "can permit the virtual

same state laws as applied to a national congressional race, the same 1st and 14th Amendment claims at issue here were raised with defendants who argued no jurisdiction and a First Amendment right of a party to use a convention to control primaries. Hopfmann v Connolly (1985) 105 SCt 2106. Cert was granted unanimously, the Court holding: "Among the theories [plaintiffs] advanced was a claim that the provision, as enforced by Massachusetts [or, as here, not enforced] violated the First and Fourteenth Amendments" It appears that federal jurisdiction of cases like this one is now a settled matter.

However, all that is necessary is that the plaintiffs' claims in their complaint be substantial, not even settled, and

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nullification of the primary process;" and states may not be able to retain the authority to assure a fair and open primary. id Virtually the same can be said about allowing party insiders to use a similar "jaybird" convention system to "steer" the results.

their claim cannot be dismissed from the federal courts, even if the averments be found wanting in merits. Hart v B.F. Kieth Vaudeville Exchange (1923) 262 US 271. Here it is evident that the court found the merits of greater significance in support of its decision than the actual elements necessary to find or not find jurisdiction. This was improper. The "face of the complaint" rule applies and here the lower court ignored it, not once referring to or considering allegations in the complaint in arriving at or supporting its decision. Louisville & N R. Co. v Rice (1918) 247 US 201.[19] It commented upon the good faith of the plaintiffs, were they but in a state court. Ap 17-22 But it failed to deal with the allegations of their complaint, indicating that

[19]Except, of course, with regard to the question of laches, toward which the court was so predisposed as discussed below, where it insisted on misreading the allegations of the complaint as regards existence of the practice vs. scienter.

federal issues of unequal protection could be raised only if the state forums were first tried and found wanting. Ap 17-22,23,24 This is error. Railroad & Warehouse Com. v Duluth S.R.Co. (1927) 273 US 625; Lane v Wilson (1939) 307 US 268.

Thus, the district court ignored the "face of the complaint rule," improperly suggested an exhaustion of state remedies doctrine, went into the merits on no evidence,[20] ignored the allegations of the complaint and indicated that it had made up its mind about the issues before the

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[20] After the court went on at some length about the availability of state remedies and forums, plaintiffs pointed out that there was a state court proceeding, involving different plaintiffs, that seemed to be completely stalled. Ap 17-24-27 The court agreed with plaintiffs that the denial of preliminary relief in that proceeding was on a point that was not dispositive. Ap 17-28 Yet when plaintiffs sought to introduce the lead plaintiff in that proceeding to testify about her knowledge of these practices and her efforts to correct them, the court refused vehemently, saying: "We are not taking testimony. This is an application on cross-motions. This is not, we are not taking testimony."

hearing even began based on its perception of laches. Why does this deserve plenary review ? Because, as a careful reading of the hearing transcripts at Ap 17 and 36 shows, here is a court perceiving the inequalities perpetrated by the systematic violation of the statutory scheme but ultimately deciding that it cannot do anything to stop the "system" which it concedes may or may not be legal, as if the thought of actually upholding these federally secured rights of ordinary voters and non-mainstream candidates within parties were as unthinkable as the thought of black voters and candidates effectively participating in the mainstream of politics was in the segregationist South. This court has recognized, in Davis, supra, the importance of applying equal protection of the laws under the 14th Amendment to political as well as racial groups. There

can be no important political group in American political life than the ordinary mainstream of party voters and those candidates who emerge from their ranks rather than from the inner circles and conventions of the partys' established leadership. They are equally as important to the "fluidity" of American political life as the candidates and voters whose franchise was abridged in the Jim Crow South or in the apportionment cases. They are as important as the minor parties and candidates whose rights were recognized in Williams v Rhodes 373 US 23 (1968); Anderson v Celebrezze 460 US 938 (1983) and similar cases. It should be made clear to that a failure to address the constitutional rights of this important group in the hopes that systems which may or may not be legal can keep operating because of indifference on the part of the authorities who should be assuring their

legality will not be tolerated in the name of unsupported jurisdictional holdings that challenge the established holdings of this Court, that the courts of this nation are still available to the vast majority of the electorate who are the rank-and-file of the major political parties when their right to have their vote count-- fully-- when they vote for congressional nominees is threatened by the inevitable process of insider attempts to consolidate "elitist" and anti-democratic control, regardless of how familiar and comfortable this inevitable tendency may become. In the constitutional debates[21] James Madison pointed out that delegation of the power to state legislatures in Art. I,Sec.4, was subject to recall by Congress because to give it exclusively to states would enable the latter to, by slow steps, dissolve the union. Now that primaries are an

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[21] Quoted in U.S. v Gradwell 243 US 476, at 484 (1919)

essential part of the electoral process, to allow parties to subvert them by private rule-making would let parties do what the Framers restricted state legislatures from doing, an unacceptable proposition in a federal republic.

ABUSE OF DISCRETION BY THE DISTRICT COURT IN DENYING PRELIMINARY INJUNCTIVE RELIEF

Given that federal jurisdiction exists and dismissal was error, was the denial of preliminary relief error ? How did the district court abuse its discretion in denying the preliminary injunctive relief sought, particularly with regard to U.S. v Corrick 298 US 435 (1936) and Mayo v Lakeland Highlands Canning Co. 309 US 310 (1940) cited in Rule 15.1(i) ? These cases dealt with interlocutory appeals. what about this situation where denial of preliminary relief is appealed along with a dismissal and it turns out that the dismissal was error ? The rule speaks of appeal from denial of a preliminary

injunction as well as from a grant of one.

With refusal, as with granting, the inquiry on appeal should be limited to the question of abuse of discretion. Applying the Mayo language to this case, it is seen that discretion was abused in not granting the preliminary injunctive relief sought:

> "[t]he question before it [the lower court] was not whether the [failure to obey and enforce N.J.S.A. 19:52-34] was constitutional or unconstitutional; was not whether the [defendants] had complied with the requirements of the act, if valid, but was whether the showing raised serious questions, under the Federal Constitution and the state law, and disclosed that [lack of] enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants." [22]

Thus confining the question, this Court made clear that adherence to Rule 52 (a) was required, with clear findings of fact and law and support of the former by the

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[22] The lower court here seems to have overlooked, despite being urged otherwise, that it's defendants who're violating the law in question and urge its nullity under the First Amendment, not the plaintiffs.

evidence and the record. The language in Mayo about the lower court applies here:

> "The observations made in the course of the opinion are not, in any proper sense, findings of fact upon these vital issues. Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the... [allegations of the complaint].
>
> "It is of the highest importance to a proper review of the action of a court in...refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure. [footnote omitted]"

Here, the court, as it admitted in an exchange with plaintiffs' counsel during the May 30 hearing, had already decided before reading anything from defendants, i.e., before any cross-motion for dismissal was made, when the only motion outstanding was plaintiffs' for immediate injunctive relief, that it would lean toward not taking jurisdiction of the matter based on a theory of laches.[23]

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[23] Ap 36-15 "I didn't, I am not hallucinating. I read it in your moving papers, because I read it before I

It is not surprising, in light of this predisposition, that the standard of Mayo and Corrick was violated. When prodded by the appeals court into giving an opinion, the district court addressed the question, essential to preliminary injunction findings, of likelihood of success on the merits, and found:

> "Not only is there not a likelihood of success on the merits, but quite frankly, there is no likelihood of success, since the Court does not even have jurisdiction in the matter." op. cit.

(Cont.)
received anything in response from the defendants." (This refers to the matter alluded to above of confusing the existence of the practice complained of, as alleged in the complaint, with scienter on the part of plaintiffs.) After an attempted interjection by counsel, the judge then revealed that he had become predisposed not to take jurisdiction of the matter because of the lateness of the filing as he saw it: "And it piqued my interest, because I know I think maybe the day before I received at my own house, the announcements of the primary or, it was a couple of days later, whatever it was, the mailing, and I said my God, how am I going to get involved in something like this when, you know, the horse race is already under way ? Ap 36-16"FN

Thus the court below did not really consider the likelihood of success on the merits in response to plaintiffs' motion but cut to the dismissal motion and, deciding that in accord with its admitted predisposition, used that bias to dispose of the required issue with improper support, a circular process of reasoning.

This circular reasoning as we have seen was based upon the mistaken notion that 50 separate state statutory schemes could not embody federal law governing the times, places and manner of electing members of Congress. Plaintiffs' lengthy briefs going into constitutional cases supporting its arguments in considerable detail, along with lengthy oral argument, were dismissed as "vague references to constitutional provisions...and a short

seminar in the federalist papers,..."[24]

Earlier, speaking of plaintiffs' use of these documents shedding light on the intent of the Framers, the court said:

> "Of course, I am appreciative of the Federalist papers. I have read what you have given to me, I read them in college, but we are not dealing in history here, we are dealing in law, and even a new judge like myself doesn't want to get reversed. Let's put it to you that way." Ap 17-5

Having thus dispensed with any support for holding on the meaning of constitutional provisions at issue from those who drafted them, the court then proceeded to find:

> "I am firmly of the opinion that this is a classic traditional and textbook example of a plaintiff who knew or, at the very least, should have known, although I hold and find that the plaintiff knew of the rights which he is bringing to this Court. We are dealing with someone who is intricately involved in the election process, and the facts upon

---

[24]Ap 1-4 Two justices of this Court received plaintiffs first request here for single justice relief which was then filed with a brief cover below for the brief for the May 30 hearing, so that the petition on file here will demonstrate that plaintiffs briefed at length and in detail.

> which this complaint is based were known by him, or at the very least, and I am not capitulating my decision to that point, should have been known. For him to come to court with an application, I think the application was filed in front of me approximately two weeks prior to the primary, [25 days] is in such poor taste that I would prefer not to use words to describe the laches which were engaged in and the expense and the inconvenience which the complaint seeks to put everyone to." Ap 1-6

Thus the court preferred not to use words to provide reasons for a theory of laches affecting jurisdiction based, not on an articulated balancing of the equities involved, but on a theory of taste. It would seem it owed words to the plaintiffs seeking the injunctions under Mayo and Corrick. This considering of the matter as de gustibus is illuminated by its admission in the May 30 hearing set out in n. 17 above about the steering system that everyone knew about whether legal or illegal. When the Court explained how the system works, counsel said: "I understand,

your Honor." The court replied: "Why don't you relax ?"

In light of this attitude as the support of the court's findings the application of precedents from the civil rights struggle in the South by plaintiffs seems apropos. In light of its failure to discuss any equity on plaintiffs' side though a number were briefed and argued, it scarcely seems a legitimate support for denying the request for injunctive relief that the request was late in the day and that the "system," regardless of its legality, should not be disturbed. An equitable defense requires clean hands and the doing of equity by its invokers. Plaintiffs' arguments in this regard were ignored. If this were a valid defense, segregation would be with us still.

The court found it:

> "extremely costly to reprint the necessary ballots, and it causes confusion, complexification, and has very poor results on the voting public."

It did not speak of the cost to the plaintiff candidate to overcome the advantage of the prohibited endorsement and, of cost to the voters of thinking that they were beneficiaries of the no-endorsement primary selection process enacted by their legislature when in fact the process is being "steered" to their disenfranchisement. The court should have taken related allegations of the affidavit and complaint as given. The cost of destruction of a primary system by slow degrees of acquiescence and a hanging out of a "do not disturb sign" to those who would challenge such choking of the democratic process should be considered.

The court then made a finding that:

> "there is absolutely no connection between the endorsement which plaintiff challenges and the slogans on the ballot which plaintiff seeks to remove."

The lack of support for this finding is seen from defendant Laurenti's slogan: If "Regular Democratic Organization" doesn't indicate to the voting public in this situation that the man using it is endorsed by the party there's not likely to be a phrase that would so indicate.

There weren't proper findings supporting denial of preliminary relief to plaintiffs' prejudice. The effect, with the failure to accept jurisdiction, like the actions of the court and the parties benefitting from the error in Corrick, is to condone and perpetuate violation of the statute. The statute shouldn't be unenforced till the issue's decided. It's presumed legitimate. The circumvention should be stopped.

The leading cases concerning an unconstitutional continuing evasion of constitutional strictures and laws designed to insure fair elections are

from the Civil Rights struggle in the South. Hamer v Campbell 358 F2d 215 (CCA5 1966), cert.den.1966 385 US 851; Bell v Southwell 376 F2d 659 (CCA5 1967); and Brown v Post 279 FSupp 60 (EDLa 1968) There the courts were faced with an ongoing "system" that everybody knew about but whose legality was as questionable as the "system" outlined in the complaint in this case. In the two earlier cases of the three that went to appeal the plaintiffs encountered the same type of reaction as encountered here in the district court: a reluctance to disturb an admittedly dubiously legal system that insiders were comfortable with and reluctant to change, a concern for protection of the unconstitutional activity of long duration rather than the rights being infringed. Because the first two cases were decided the way they were, the third one was decided

correctly at the district court and then the practices virtually ceased.

CONCLUSION

Races for the national Congress and the rights of candidates and their supporters with regard to them are federal matters and where inequalities under the 14th Amendment and impingement upon associational freedoms under the 1st are alleged, those allegations, for purposes of a dismissal motion, are taken as true and, being non-frivolous, jurisdiction should be noted. In the situation where allegations on their face establish an ongoing, longstanding evasion of constitutional strictures protecting fair primaries and the state laws embodying them, injunctive relief should be available to those harmed by the unconstutional practices and, where not granted below, corrective retroactive relief should be granted.

Respectfully submitted,

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2762 Woodley Place, N.W.
Washington, D.C. 20008
(202) 628 1114

Joseph F. Shanahan
Box 105 RD 2
Alexauken Creek Road
Lambertville, N.J. 08350

CERTIFICATE OF SERVICE UNDER RULE 28

I hereby certify that I am a member of the bar of this Court, and that I have served by U.S. Mail, first class, postage prepaid, this 29th day of December, 1986, true and accurate copies of this Jurisdictional Statement, together with the accompanying appendices, in two volumes, 3 copies for each defendant, upon the following counsel of record below: Donna Kelly-Boccher, Esq., Dep. A.G., Hughes Justice Complex, CN 112, Trenton, NJ; Lenin I. Fishman, Esq., 150 West State St., Trenton, NJ 08608; Mark Setaro, Esq., 222 S. Broad St., Trenton, NJ, 08608; Barry D. Szaferman, Esq., 640 S. Broad St., Trenton, NJ 08608; Walter R. Bliss, Jr., Esq., 126 Wall St., Research Park, Princeton, NJ 08540; John J. Hoagland, Esq., 303 George St., 3d Fl., New Brunswick, NJ 08901; John C. Sahradnik, Esq., 212 Hooper Avenue, P.O. Box 757, Toms River, NJ 08753

Laurence A. Elgin

*counsel of record

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1079

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

STEPHEN A. KOCZAK, KATHERINE E. ROTTER, and JOHN G. RESCH,
Appellants,

v.

G. DALLAS DIXON, THE MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE, JEFFREY LAURENTI, HOWARD KAYE, GERALD STOCKMAN, LOUISE LOMMA, JANE BURGIO, W. CARY EDWARDS, THOMAS H. KEAN,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

---

Appendix Vol. I

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

STEPHEN A. KOCZAK, KATHERINE E. ROTTER, and JOHN G. RESCH,
Appellants,

v.

G. DALLAS DIXON, THE MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE, JEFFREY LAURENTI, HOWARD KAYE, GERALD STOCKMAN, LOUISE LOMMA, JANE BURGIO, W. CARY EDWARDS, THOMAS H. KEAN,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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Appendix Vol. I

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 86-1586
OPINION OF THE COURT

STEPHEN A. KOCZAK,
et al.,

Plaintiffs,

v.

G. DALLAS DIXON, et al.,

Defendants.

Trenton, New Jersey
May 30, 1986

B E F O R E: THE HONORABLE ROBERT E. COWEN, U.S.D.J.

A P P E A R A N C E S:

BRENER, WALLACK & HILL
BY: MITCHELL NEIDER, ESQ., and
LAURENCE A. ELGIN, ESQ., (D.C. Bar),
For the Plaintiffs.

W. CARY EDWARDS, ATTORNEY GENERAL,
BY: DONNA KELLY-BOCCHER, D.A.G.,
For Defendants Governor Kean, Secretary of State, Attorney General of New Jersey.

PAUL T. KOENIG, ESQ.,
For Defendant Mercer County Clerk.

GLEN FILIPPONE, ESQ.,
Assistant Burlington County Prosecutor,
For Defendant Burlington County Clerk.

LEONARD FISHMAN, ESQ.,
For Defendant Burlington County Clerk.

MARK SETARO, ESQ.,
For Defendant Jefirey Laurenti.

LYNNE JOHNSTON, C.S.R.
Official Court Reporter
United States District Court
P.O. Box 6822
Lawrenceville, New Jersey 08648
(609) 695-0535

THE COURT: This is a case concerning the Mercer County Democratic Committee and the Mercer County Democratic Central Committee. Before the Court are plaintiffs' motions for preliminary injunction and defendant's cross-motion which was filed on short notice with the permission of the plaintiff seeking to dismiss the complaint.

The essence of the plaintiffs' complaint is that the Mercer County Democratic Central Committee is the alter ego of the

Mercer County Democratic Committee and since New Jersey law forbids and prohibits the latter from endorsing primary candidates, it may not do so through the former.

While the plaintiff may have a claim under State law, and I make no decision one way or the other concerning the merits of this case, if this matter were before a State Court trivunal, I fail to see how he, as has stated, a claim under federal law upon which relief can be granted. The plaintiff in his moving papers continually referred, and he did on argument, to "delegated federal law." Apparently, this is a reference to the State law governing the conduct of Congressional elections which states are allowed to enact prusuant to Article I, Section four fo the Federal Constitution.

The plaintiffs' argument should be rejected and is rejected since its acceptance would produce the peculiar result that all State election law in all 50 states, when applied to the Congressional elections, is federal law. It is certainly true that Congress has the power to override State law in matters governing Congressional elections, but this unexercised power does not, and I think I used the expression previously, "federalize" existing State law in every single state.

Although there have been vague references to constitutional provisions by the plaintiff and a short seminar in the federalist papers, I have not seen the subject matter jurisdiction of this Court set forth with particularity upon which this Court can adjudicate the matters which have been brought before me. And it seems

that the federal claims are certainly subject to dismissal, for the same reason -- well, by reason of my dismissing the claims which I have just alluded to, the pendent claims must also be dismissed, all without prejudice.

Certainly plaintiffs' motion for preliminary injunction should be denied. Not only is there not a likelihood of success on the merits, but quite frankly, there is no likelihood of success, since the Court does not even have jurisdiction in the matter.

However, even if this Court did have jurisdiction, which it has ruled it does not, I am firmly of the opinion that this is a classic traditional and textbook example of a plaintiff who knew or, at the very least, should have known, although I hold and find that the plaintiff knew of

the rights which he is bringing to this Court. We are not dealing with someone who is unsophisticated or a babe in the woods. We are dealing with someone who is intricately involved in the election process, and the facts upon which this complaint is based were known by him, or at the very least, and I am not capitulating my decision to that point, should have been known. For him to come to court with an application, I think the application was filed in front of me approximately two weeks prior to the primary, is in such poor taste that I would prefer not to use words to describe the laches which were engaged in and the expense and the inconvenience which the complaint seeks to put everyone to.

As the affidavits of the defendants have spelled out, it is extremely costly to

reprint the necessary ballots, and it causes confusion, complexification, and has very poor results on the voting public.

Finally, while it is not necessary to my decision, I think it is worth noting that there is absolutely no connection between the endorsement which plaintiff challenges and the slogans on the ballot which plaintiff seeks to remove. A candidate who wishes to use a slogan simply submits that slogan before any other candidate submits the same slogan. I wish to endors this since I just don't understand the plaintiffs' agrument in that regard, since it is apparent to me that this statement which I have made is all too clear and not even subject to any debate.

For all of the reasons set forth above, I am dismissing the complaint and I am further denying plaintiffs' application for

any stay of this dismissal. All right.

Gentlemen and lady, whether you agree or disagree with my decision as I have articulated it here, is there anything further at this time which is necessary in order for the Circuit to review this matter for the plaintiff?

MR NEIDER: Just indicate, your Honor, so that the record is clear, while some of the defendants are not here today, I can make the representation that I spoke to either counsel or counsel's office of, for all defendants who entered an appearance, advised them of today's scheduled hearing before your Honor and papers were served on them accordingly.

THE COURT: All right. What you are saying is everyone has been noticed?

MR. NEIDER: That's correct, your Honor.

THE COURT: Very fine. Anything further

for the defendants?

MS. KELLY-BOCCHER: No, your Honor.

MR. FISHMAN: No, your Honor, nothing further.

THE COURT: All right. I will request that the reporter transcribe my opinion at the cost and expense of the plaintiff as soon as possible, and as soon as practicable.

MR. NEIDER: Thank you, your Honor.

THE COURT: Thank you.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86-5348

STEPEHN A. KOCZAK,
KATHERINE E. ROTTER, and
JOHN G. RESCH,

Appellants

v.

G. DALLAS DIXON,
THE MERCER COUNTY DEMOCRATIC COMMITTEE,
THE MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE,
JEFFREY LAURENTI, HOWARD KAYE,
GERALD STOCKMAN, LOUIS LOMMA, HANE BURGIO,
W. CARY EDWARDS, THOMAS H. KEAN

On Appeal from the United States District Court

For the District of New Jersey (Trenton)

(D.C. Civil No. 86-1856)

District Judge: Robert E. Coven

Submitted Under Third Circuit Rule 12(6)

September 18, 1986

Before: SEITZ, HIGGINBOTHAM and SLOVITER, Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellants.

By the Court,

Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT
No. 86-5348

STEPHEN A. KOCZAK, etc.

vs.

G. DALLAS DIXON, etc.

Stephen A. Koczak, Katherine E. Rotter and John E. Resch, Appellants

Present: SEITZ, HIGGINBOTHAM and SLOVITER, Circuit Judges

1. Motion by Appellants for an order staying the mandate of judgment of this court dated September 30, 1986 and granting emergency relief to include the Re-running of the Democratic primary election for United States Congress in the 4th District of New Jersey before the general election on November 4, 1986, etc.

2. Copy of Application to the Honorable William J. Brennan for stay of judgment, etc. with attachments to the applications.

3. The Judgment order was entered on September 30, 1986 in the above-entitled case. Any Answer which would be due by October 27, 1986 will be forwarded upon receipt of same.

Reepectiully,

Deputy Clerk

The foregoing Motions are denied

By the Court,

Circuit Judge

Dated: October 22, 1986

ORDER OF THE THIRD CIRCUIT DENYING PLAINTIFFS' MOTION TO EXPEDITE, AUGUST 29, 1986

CAPTION

Present: SEITZ, HIGGINBOTHAM, and SLOVITER, Circuit Judges.

1. Appellants' motion to expedite and waiver of claim to oral argument and waiver filing of reply brief, with request that appellees' brief be filed by August 26, 1986, and list case in September 1986, so that a primary might be held in that month,

2. Letter-response of appellee, G. Dallas Dixon, to appellants' motion to expedite, etc., in the above-entitled case.

Respectfully,

Deputy Clerk

The foregoing Motion is denied except that the matter may be listed at the convenience of the Clerk after Sept. 3, 1986.

By the Court,

Judge

Dated: August 29, 1986

ORDER OF THE THIRD CIRCUIT DENYING
PLAINTIFFS' MOTION TO SUPPRESS DEFENDANT
MOTION NOT FILED IN CONFORMITY WITH RULES

CAPTION

Present: SEITZ, HIGGINBOTHAM, and

SLOVITER, Circuit Judges.

1. Appellants' motion to suppress letter-response of appellees, Dixon and Mercer County Democratic Committee, in opposition to appellants' motion to expedite, on the ground that letter-response did not conform to the Court rules relative to form of motion and other papers, in the above-entitled case.

Respectfully,

Deputy Clerk

The foregoing Motion is denied

By the Court,

Judge

APPENDIX 6: NOTICE OF APPEAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 86-5348

STEPHEN KOCZAK, et al.	ON APPEAL FROM A [JUDGMENT OF THE UNITED STATES [DISTRICT [COURT
Plaintiffs [-Appellants	FOR THE DISTRICT [OF NEW [JERSEY Trenton Division
v.	
G.DALLAS DIXON, etal.	Civil Action
Defendants- [Appellees	

NOTICE OF APPEAL

Joseph F. Shanahan
RD 2 Box 105
Lambertville, New Jersey 08530
609- 397- 3158

Laurence A. Elgin
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202-628-1114

TO: SALLY MRVOS
Clerk, Third Circuit
United States Court of Appeals

All Counsel on Certificate of Service filed herewith

[p.2]

NOTICE is hereby given that STEPHEN A. KOCZAK, KATHERINE E. ROTTER and JOHN E. RESCH, above-named plaintiffs-appellants, hereby appeal to the Supreme Court of the United States from the final judgment Order of the United States Court of Appeals for the Third Circuit entered in the action on 30 September, 1986, which was then followed by a denial of motion for stay of mandate of judgment and granting of emergency relief on 22 October, 1986.

This appeal is taken pursuant to 28 U.S.C. s.1254 (2).

[signed]

Joseph F. Shanahan
Counsel for Plaintiffs-
[Appellants.

CERTIFICATE OF SERVICE
(In compliance with Supreme Court rule 28)

I hereby certify that I am a member of the bar of the United States Supreme Court and that I have caused to be mailed, U.S. Mail, first class, postage prepaid or hand delivered, on 22 December 1986, two copies of the Notice of Appeal to the Supreme Court of the United States to all of the following counsel: (continued on following page)

(signed) Joseph F. Shanahan

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Deputy Attorney General
Hughes Justice Complex
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Trenton, New Jersey 08608

[signed] Joseph F. Shanahan

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR DAMAGES FOR VIOLATION OF CONSTITUTIONAL AND CIVIL RIGHTS

STEPHEN A. KOCZAK, 261 Ashmore Ave, Trenton, Mercer County, New Jersey, individually and as he is a voter in Mercer County and a qualified candidate for the nomination of the Democratic Party for office of the U.S. House of Representatives from the fourth congressional district who are eligible to run for the office of party nominee for the national legislature, KATHERINE A. ROTTER, 911 Hudson Street, Trenton, Mercer County, New Jersey, and JOHN G. RESCH, 1845 South Clinton Avenue, Mercer County, Trenton, New Jersey, individually and as a registered voters and members of the Mercer County Democratic Party.

Plaintiffs,

v.

G. DALLAS DIXON, 222 South Broad Street, Trenton, Mercer County New Jersey, individually and as Chairman of the MERCER COUNTY DEMOCRATIC COMMITTEE, Chairman of the Mercer County Democratic Central Committee and leader of the Mercer County Democratic "organization"; "THE MERCER COUNTY DEMOCRATIC COMMITTEE, 901 South Broad Street, Trenton, Mercer County, New Jersey; THE MERCER COUNTY DEMOCRATIC

CENTRAL COMMITTEE, 222 South Broad Street, Trenton, Mercer County, New Jersey; JEFFREY LAURENTI, 464 Hamilton Avenue, Trenton, Mercer County, New Jersey, individually and a Democratic candidate for the fourth congressional district; HOWARD KAYE, 102 Graf Avenue., Lawrenceville, Mercer County, New jersey, individually and representative of those who serve on both defendant committees; GERALD STOCKMAN, 176 West State Street, Trenton, Mercer County, New Jersey, individually and as a public officeholder; LOUISE LOMMA, 1501 Parkside Avenue, Ewing, Mercer County, New Jersey; JANE BURGIO, 405 West State Street, individually and as Secretary of State of New Jersey; W. CARY EDWARDS, Richard Hughes Justice Complex, CN 080, Trenton, Mercer County, New Jersey, individually and as Attorney General of the State of New Jersey; THOMAS H. KEAN, State Capitol, Trenton, Mercer County, New Jersey, individually and as Governor of the State of New Jersey.

Defendants.

Plaintiffs by way of Complaint against the defendants allege as follows:

JURISDICTION

1. Jurisdiction is conferred on this

Court, and this action is authorized by 28 U.S.C. 1331, 28 U.S.C. 1343, 28 U.S.C. 2201, 28 U.S.C. 2202, 42 U.S.C. 1983, 42 U.S.C. 1985, 42 U.S.C.1986, Art.I, Sec.2, Cl.1, Art.II, Sec.4, Cl.1, Art. VI, Cl.3, and the First Amendment and Fourteenth Amendment to the Constitution of the United States.

PARTIES

STEPHEN A. KOCZAK

2. Plaintiff STEPHEN A. KOCZAK ("Koczak") is an adult citizen of the United States, residing at 261 Ashmore Avenue, Trenton, Mercer County New Jersey, above 25 years of age who is a registered Democrat and voter in Mercer County, New Jersey and who is at present a duly qualified candidate for the nomination of his party for Representative in Congress on the fourth district of New Jersey.

3. Plaintiff brings this suit both as an individual and on behalf of all those in the Mercer County Democratic Party, who, like him, are eligible to run for federal legislative office.

KATHERINE E. ROTTER

4. Plaintiff KATHERINE E. ROTTER ("Rotter") is a registered voter and member of the Democratic Party in Mercer County who desires to vote for the plaintiff Koczak as a candidate for the party nomination for representative from the fourth congressional district unencumbered by preferential treatment or placement on the ballot of any endorsement or statement that indicates or implies that any party organization has endorsed plaintiff Koczak's opponent. In addition thereto, plaintiff Rotter brings the present action on behalf of all registered Democratic voters in Mercer County, both within and

without the local democratic organization, who seek to vindicate the statutory prohibition contained in N.J.S.A. 19:34-52 and who desire an open primary process.

JOHN RESCH

5. Plaintiff John G. Resch ("Resch") is a registered voter and member of the Democratic Party in Mercer County who desires to vote for the plaintiff Koczak as a candidate for the party nomination for representative from the fourth congressional district unencumbered by preferential treatment or placement on the ballot unencumbered by preferential treatment or placement on the ballot or any endorsement or statement that indicates or implies that any party organization has endorsed plaintiff Koczak's opponent.

G. DALLAS DIXON

6. Defendant G. Dallas Dixon ("Dixon") is the Chairman of the defendant MERCER COUNTY

DEMOCRATIC COMMITTEE, and the Chairman also of the defendant MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE.

7. It is alleged upon information and belief that defendant Dixon is the leader of the G. DALLAS DIXON "organization" of the Mercer County democrats.

8. It is alleged upon information and belief that defendant Dixon has in the past encouraged and aided some candidates to have slogans or statements put next to their names on the primary ballot which would indicate that they are endorsed by the
Democratic Party and the inner organization thereof whereas certain candidates, such as plaintiff Koczak, are thereby made to appear as outsiders and unendorsed "renegade" candidates with a consequent negative effect on their campaigning.

10. In accordance with the By-laws of the

defendant MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE, Dixon has the power to call or not call meetings and is responsible for proper notice of the same, and that under the By-laws he controls the appearance before the Central Committee of candidates seeking endorsement for elective office.

MERCER COUNTY DEMOCRATIC COMMITTEE

11. The defendant MERCER COUNTY DEMOCRATIC COMMITTEE ("County Committee") is a statutorily authorized county committee created by virtue of N.J.S.A. 19:3-5 et seq.; the method of selection of whose members is prescribed by the legislature.

12. The County Committee is chaired by Defendant Dixon.

13. The County Committee is forbidden by statute, N.J.S.A. 19:34-52, to screen or endorse candidates prior to a primary.

14. The day-to-day operations of the

defendant County Committee are run out of the office suite occupied by Defendants Dixon and Louise Lomma.

MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE

15. It is alleged upon information and belief that the Mercer County Democratic Central Committee ("Central Committee") was created some years ago by principals of the defendant COUNTY COMMITTEE for the avowed purpose of endorsing and screening party candidates prior to the primary in violation of N.J.S.A. 19:34-52.

16. The defendant County Committee is not authorized or sanctioned in any way by any law or statute enacted by the New Jersey legislature and has no official status of any kind under the laws of New Jersey.

17. In accordance with the By-laws of the Central Committee the express purpose of said committee is to endorse and screen candidates prior to the primaries. A true

and correct copy of the By-Laws of the Central Committee is attached hereto as Exhibit "A" and incorporated herein.

18. The Central Committee has over the years screened and endorsed candidates and has done so again this election year at its convention held April 2, 1986, with the intent to communicate to the public the names of the candidates so endorsed, including without limitation, the name of defendant Jeffrey Laurenti.

19. The defendant Dixon is Chairman of the Central Committee by virtue of his office as Chairman of the County Committee. Likewise, the other officers of the Central Committee are also the officers of the County Committee.

20. The Central Committee, like its official "twin", the County Committee is operated on a day-to-day basis out of the offices of defendant Dixon.

21. The mail and administrative work of the Central Committee is handled by defendant Louise Lomma, an employee of the County Committee out of the offices of the County Committee. The Central Committee has no staff or services of its own, but must rely upon the staff and services of the County Committee.

22. The meeting calls and agenda of the Central Committee are controlled by defendant Dixon.

23. The rules of the Central Committee show that the procedures by which its members are selected bear no resemblance to the methods of selection of members prescribed by the state legislature for the selection of the members of the defendant County Committee.

24. In addition to the members of the Central Committee members who are members by virtue of their being members and/or

officers of the defendant County Committee, the Central Committee has numerous members who are at present incumbent officeholders.

25. Furthermore, twenty five (25) members of the Central Committee are chosen by defendant Dixon by personal preference.

26. Approximately 55 percent of the members of the defendant Central Committee are also members of the defendant County Committee.

JEFFREY LAURENTI

27. Defendant Jeffrey Laurenti ("Laurenti") is running for the Democratic Party's nomination for the office of nominee of the party for Representative in Congress from the fourth congressional district as the opponent of plaintiff Stephen A. Koczak.

28. Defendant Laurenti is a member of the defendant central Committee and, as such, received the endorsement of that body at

its convention held on April 2, 1986. Defendant Laurenti has represented and is representing to the press that he is such endorsee, and is allowing others to do so as well.

29. It is alleged upon information and belief that defendant Laurenti has submitted or is submitting to the Secretary of State a slogan or statement which he wishes to accompany his name on the primary ballot which states that he is the endorsed Democratic "organization" candidate despite the state statutory ban on such endorsements by party committees.

30. The defendant GERALD STOCKMAN ("Stockman") is a member of the New Jersey State Senate, and a member of the defendant Central Committee.

31. It is alleged upon information and belief that defendant Stockman is a member of the Mercer County "organization"of

defendant Dixon.

32. It is alleged upon information and belief that defendant Stockman participated as nominator of Laurenti in the convention of the defendant Central Committee at which defendant Laurenti was endorsed and plaintiff Koczak was not.

33. Defendant Stockman is representative of the incumbent officeholders affiliated and allied with defendant Dixon and the latter's "organization" who in the past, and presently, participate in nominating candidates for elective office through the Central Committee though they cannot do so through the County Committee.

LOUISE LOMMA

34. Defendant LOUISE LOMMA ("Lomma") is a member, employee and the Secretary of the defendant County Committee.

35. Defendant Lomma is also a member of the defendant Central Committee and a

member of the Mercer County Democratic "organization" of defendant Dixon.

36. It is alleged upon information and belief that defendant Lomma administers the day-to-day business of both the aforesaid committees, and handles their mail out of the offices of defendant Dixon.

HOWARD KAYE

37. Defendant HOWARD KAYE ("Kaye") is a member of both the defendant County Committee and the defendant Central Committee.

38. Defendant Kaye is the Chairman of the Credentials Committee of the Central Committee and a member of the Mercer County Democratic "organization" headed by defendant Dixon and as such is representative of the class of individuals who are members of both committees.

JANE BURGIO

39. Defendant JANE BURGIO ("Burgio") is

Secretary of State of New Jersey and the state official entrusted with cabinet level responsibility for composing the primary ballots and deciding the positioning of names upon them and deciding also upon whether the slogans or statements which appear on the ballot with the names as submitted by the candidate will be printed upon the ballots.

40. Defendant Burgio is also the cabinet level official with the responsibility for deciding whether the "bracketing" of names upon the ballot will be done as applied for by the candidates.

41. The actual state election commission handling these matters is under supervision of defendant Burgio and is part of the department which she runs and administers.

42. Defendant Burgio is sworn to uphold the federal laws and constitution as required by Art. VI of the federal

constitution.

W. CARY EDWARDS

43. Defendant W. Cary Edwards is the chief law enforcement officer of the State of New Jersey, and is sworn to uphold the laws and the Constitution and responsible for fairly administering the election laws and punishing those who violate them in elections held in the state, including those for the nomination and election to the national legislature.

THOMAS H. KEAN

44. The defendant THOMAS H. KEAN is the chief executive of the State of New Jersey, and as such, is entrusted with faithfully administering and executing the laws in accord with and the United States Constitution.

45. Defendant Kean is responsible for the certification of winning candidates and the validity of their elections in the State of

New Jersey, including federal candidates for the national legislature nominated and elected in the state.

46. Defendant Kean is sworn to uphold the federal laws and the Constitution of the United States.

COUNT 1

47. Plaintiff Koczak is entitled to run as a candidate for nomination to his party's office of nominee for the United States Congress from the fourth district of New Jersey under the state statutory scheme prescribed by the legislature of this state pursuant to the constitutional mandate of Art. I, Sec 4, Cl. 1, the "Times, Places and Manner Clause."

48. The plaintiff voters and other similarly situated voters who wish to vote for plaintiff candidate Koczak or other independent Democratic candidates are entitled to vote for their candidate of

choice for the office of Democratic Party nominee for the office of nominee for the office of Representative in Congress from the fourth district as a candidate subject only to the prescription of the state legislature as to the times, places and manner of his seeking election and unburdened by any disadvantage vis-a-vis another candidate in the form of an endorsement of any other candidate by any party organization or artificial entity when the legislature has prescribed such endorsements.

49. The rights of the voter plaintiffs and the candidate plaintiffs are intertwined and mutually affected by the violations of constitutional provisions and rights complained of herein.

50. The state statutory scheme enacted into law by the legislature of New Jersey, specifies the role that committees of

political parties may play in the electoral process, including primaries, and, as part of that scheme, at N.J.S.A. 19:34-52, prohibits party committees from endorsing any candidate prior to the party's primary election.

51. The primary election in New Jersey in which plaintiff Koczak is a candidate for his party's nomination for the office of representative in congress from the fourth district takes place on June 3, 1986.

52. Historically, party conventions previously provided the party nominees in New Jersey.

53. However, because of public dissatisfaction with the political manipulation at conventions, the legislature replaced the convention system of nominations with primary elections.

54. In so doing, the legislature chose to forbid endorsements by any party entity or

group other than individuals exercising their first amendment rights of expression and speech by controlling party committees, forbidding them from endorsing candidates prior to primaries and prohibiting existing, incumbent officeholders from serving in their ranks.

55. The defendant Mercer County Democratic "Committee, acting through certain of its principals, acted to circumvent this statutory scheme and the prohibitions it contains by creating an unauthorized Central Committee with overlapping executive control, substantial overlapping membership, including membership by incumbent officeholders, entrenched and otherwise, for the purpose of endorsing candidates prior to primaries and did so create such a committee, the defendant Central Committee, which continues to endorse candidates to this day

and has so endorsed the defendant Laurenti for the upcoming June 3, 1986 primary to the detriment of the plaintiffs.

56. It is alleged upon information and belief that the intent of the legislature to prohibit endorsements before the primary is especially clear in that N.J.S.A. 19:34-52 was previously revoked for a period of several years but was subsequently reenacted when the "insider" manipulation which the provision was designed to prevent, reasserted itself.

57. It is alleged upon information and belief that the present defendants Dixon, Kaye, Laurenti, Stockman, Lomma, their employees, agents and representatives, despite the clear state statutory scheme forbidding it, have worked and conspired together through the G. Dallas Dixon organization within the county party and the defendant Central Committee to endorse

the candidacy of defendant Laurenti and correspondingly, burden the candidacy of his opponent, plaintiff Koczak, as unendorsed or lacking in endorsement by comparison, and have been and are urging the defendant Secretary of State Burgio to place upon the ballot adjacent to the name of the defendant Laurenti a slogan or statement containing the words "regular Democratic Organization" candidate indicating and implying that defendant Laurenti is endorsed by the "organization" of defendant Dixon and the established structure of the Democratic Party when, in fact, he has not been so endorsed by any body with legitimate authority to do so.

58. The names of the defendant Mercer County Democratic Committee and the defendant Mercer County Democratic Central Committee are confusingly similar, they operate out of the same offices, with the

same leadership and the same administrative personnel performing their functions, and the general voting public cannot be reasonably expected to, and indeed, does not distinguish between them.

59. That all of the defendants and others, under the leadership of defendant Dixon held a convention of the Central Committee on April 2, 186, and endorsed defendant Laurenti and have been representing the same to the public, particularly to reporters and others of the media.

60. That the ballots for the June 3, 1986 primary are soon to be printed and that presently defendant Laurenti has requested a slogan to be placed on the primary ballot near the name of defendant Laurenti that would state that defendant Laurenti was an "organization" Democrat, indicating clearly that he is endorsed by Dixon "organization"

and was endorsed by the convention which placed the unofficial and unsanctioned endorsement upon him in violation of the statutory scheme.

61. The plaintiffs will be irreparably harmed by the aforesaid campaigning and the impact upon the ordinary voters at the polls of this deceptive endorsement if it is not corrected, and plaintiff Koczak has already suffered harm in his campaign in loss of publicity as a candidate on equal terms with the defendant Laurenti.

62. The effect of this endorsement scheme has been to circumvent the statutory scheme enacted into law by the N.J. legislature in accordance with delegated federal law under the mandate of Art. I, Sec. 4.

COUNT II

63. The allegations of Count I are incorporated by reference as though fully

set forth herein.

64. The establishment, operation and effect of the endorsement scheme by the defendants as more fully set forth herein, constitutes an unlawful interference by the defendants in the primary process in derogation of the public interest, specifically, and without limitation, the right of individual voter participation in the choice of party candidates in violation of the legislative prohibition of N.J.S.A. 19:34-52.

65. Plaintiffs have no adequate remedy at law or otherwise for the damage done and threatened by reason of defendants' unlawful conduct as more fully set forth herein.

66. Plaintiff will suffer irreparable harm, damage and injury and have already suffered harm, damage, and injury unless defendants' unlawful conduct in

establishing or maintaining the aforesaid endorsement scheme is restrained and enjoined.

COUNT III

67. The allegations of Counts I and II are incorporated by reference as though fully set forth herein.

68. The Constitution, in Art. I, Sec. 2, Cl. 1 decrees that the members of the House of Representatives shall be chosen by the people.

69. The Legislature of New Jersey, in enacting the statutory scheme of Title 19, has amplified the role of the people in the state in choosing their Representatives in Congress at the expense of party organizations, party committees, insiders and bosses and has thereby defined what "by the people" of New Jersey shall consist of by suppressing the endorsing of candidates by any party entity other than people as

individuals and by restricting the participation of incumbent holders of public office in party committees.

70. The use of unofficial and unauthorized conventions for the avowed purpose, as here, of screening and endorsing candidates prior to the primary, increases the say of those candidates prior to the primary, increases the say of those attending the conventions in who shall be selected as nominees and correspondingly decreases the franchise of the ordinary people of the party so that the primary stage of the election is less "by the people" than the statutory scheme prescribed by the legislature.

71. In this instance defendant G. Dallas Dixon has reduced the say of those party members not on the central committee in who their candidates may be and enhanced the power of his own "organization" in

circumvention of the clear intent of the legislature.

COUNT IV

72. The allegations of Counts I, II and III are incorporated by reference as though fully set forth herein.

73. The rights of voters and candidates regarding ballot placement and statements are often intertwined as they are in this instance.

74. The right to vote for the candidate of one's choice in the freest possible manner consistent with statutory prescription is a form of protected expression as it is by the collectivity of such expressions that the calculus of political expression is arrived at.

75. The right to run as a candidate and stand for positions before the electorate in the manner that allows the greatest opportunity of equality as between candidates is a protected form of

expression.

76. Activity which reduces the role of the primary in effecting the calculus of consent as to candidates embracing positions and voters responding to them, as here, by screening and endorsing at a convention beforehand, reduces and impinges upon freedom of expression as stated in these candidate pronouncements and the voters responding to them and that freedom is protected by the First Amendment to the Constitution.

77. Freedom of association, which emanates from the First Amendment, is likewise impinged upon by these activities of the defendants other than the state executive officials in as much as they reduce the meaningful association, and the communication that attends it, to a smaller inner group from the broad total membership of the party.

78. The state statutory scheme, in establishing the primary system, and funding it, makes it a state function conducted by a private organization under state prescription.

79. The most open possible primary system under the prescription of the legislature provides an avenue for the petition of redress of grievances protected by the First Amendment which the party inner groups cannot narrow or "choke off" as here has been done, particularly where the ultimate enforcement of this narrowing of the ability to petition for redress through the ballot box is done by state officials.

80. The plaintiff voters and the plaintiff candidate are not members of either of the defendant committees or any other insider grouping or "organization" and therefore lose their right to petition for redress when these groups of which they

are not a part exercise a screening and endorsing function.

COUNT V

81. The allegations of counts I, II, III and IV are incorporated by reference as though fully set forth herein.

82. The screening and endorsing by the defendant Central Committee and the "organization" of defendant G. Dallas Dixon gives greater protection to the right of those party members who are on the central committee or in the "organization" to the right to vote and have their votes fully count in choosing their candidates than it does to the rights of those party members who are not so privileged, indeed, it enhances the voting rights of the former and gives them greater weight than those of the latter.

83. The right of the franchise is the

most important right of all in a democracy because it underlies all the other rights and without it the rest of our civil rights will soon be eroded away.

84. The inequality of voting rights produced by the defendant party officials and functionaries and committees in adopting this practice of screening and endorsing before the primary in circumvention of the legislative scheme threatens the diminution and eventual loss of this most important right of all for the great majority of the ordinary Democratic voters of Mercer County because the principle of screening and endorsing in contravention of the legislative intent, if once accepted, can easily be enlarged.

85. The actions of the defendants as more fully set forth herein violate the Equal Protection Clause of the Fourteenth Amendment.

COUNT VI

86. The allegations of Counts I, II, III, IV and V are incorporated by reference as though fully set forth herein.

87. The actions of the defendants as more fully set forth herein constitute violations of the Constitutional clauses and amendments set out in each Count, namely the Times, Places and Manner Clause, Art. I, Sec. 4, Cl. 1; the "by the people" clause for the house, Art. I, Sec. 2, Cl. 1; the First Amendment rights of expression, of association and to petition for redress of grievances, the Fourteenth Amendment Equal Protection Clause and, therefore, as such, these violations violate the statute 42 U.S.C. 1983 in that they constitute the deprivation of the specific constitutional rights and privileges alleged under color of usage of the state of New Jersey in that its

officials have allowed these defendant party officials and functionaries of the Mercer County Democratic Party to use the color of authority provided by the extension of the state's authority to the defendant county committee for the purposes of regulating the primary to empower the unofficial "central committee" to implement its scheme of screening and endorsing candidates by means of the color of authority of the defendant Secretary of State in deciding ballot placements and slogans.

88. It is alleged upon information and belief that the defendant State officials negligently allowed this to happen in past elections and are about to do so again, thereby violating, for essentially the same reasons, the prohibition of 42 U.S.C. 1986 which provides plaintiffs with a cause of action against state officials for such

negligence; for the Governor, the Attorney General and the Secretary of State have the power to prevent or aid in stopping this circumvention of the state statutory scheme which deprives plaintiffs of their rights.

89. The Governor, the Attorney General and the Secretary of State know of these matters for they have been reported in the newspapers and the Secretary of State places the endorsing slogans and is familiar with the endorsement attempts by virtue of her office.

90. That likewise the party defendants have violated the structure of 42 U.S.C. 1985 (3) which provides for damages for the plaintiffs where two one more persons conspire directly or indirectly to deprive the plaintiffs of equal protection of the laws and the plaintiffs allege that the defendant G. Dallas Dixon and his fellow defendants who are party officers and

functionaries named herein have so conspired and do so still

WHEREFORE, plaintiffs pray:

1. That this Court shall determine and declare that the state statutory scheme contained in N.J.S.A. 19:34-52 is clear and unambiguous in its intent to prohibit endorsement by groups such as the defendant Central Committee or the "organization" of the defendant G. Dallas Dixon in any guise, and the endorsement by a Central Committee violates the express terms and intent of the statute and further that federal candidates are entitled to run unburdened by any such endorsements being given to their opponents as a matter of federal law where a legislature has so prescribed.

2. That a temporary restraining order, enjoining and restraining the defendant Democratic party officials and functionaries and the Democratic Mercer

County Democratic Committee from organizing and operating the defendant Mercer county Democratic Central Committee or a similar committee or organization for the purpose of screening, nominating and endorsing candidates for office in the upcoming Democratic Primary in Mercer county and from using party assets, publishing campaign materials, making public statements, communicating with the press or otherwise actively participating in any manner whatsoever in the Democratic primary election and/or campaign on behalf of a particular candidate or candidates, except individuals acting as individuals, until further order of this Court.

3. That a temporary restraining order, preliminary injunction and on final hearing of this matter, a permanent injunction issue, enjoining and restraining defendant Jane Burgio from placing any such slogan or

statement on the primary ballot for the June 3, 1986 primary election which slogan or statement would identify, indicate or imply in any manner the endorsement by the Mercer county Democratic Committee Mercer County Democratic Central Committee or a particular group or organization of the County Democratic party of a particular candidate or candidates.

4. That a temporary restraining order, preliminary injunction and a final hearing of this matter a permanent injunction issue enjoining and restraining the defendant Jeffrey Laurenti from submitting or prosecuting any such slogan or statement to or with the Secretary of State or displaying such a slogan or statement on signs of any sort, stating it in press releases or communicating it to the representatives of the media in public which identifies, indicates or implies in

any manner whatsoever that defendant Laurenti is endorsed by the defendant Committees or a particular group or organization of the county Democratic Party.

5. That a temporary restraining order, preliminary injunction and on final hearing of this matter a permanent injunction issue, commanding the defendant W.Cary Edwards and defendant Thomas H. Kean to enforce the state statutory scheme as written with regard to the delegated federal law which it embodies for the regulation of the election of Senators and Representatives in Congress.

6. Damages.

7. Cost of suit and counsel fee.

8. Such other relief as this Court deems just and equitable.

BRENER, WALLACK & HILL
By: Mitchell Neider

2-3 Chambers Street
Princeton, N.J. 08540
(609) 924-0808
Counsel for Plaintiffs

Dated: May 9, 1986

Of Counsel:

Laurence A. Elgin, Esq.
2762 Woodley Place, N.W.
Washington, D. C. 20008

(Attachment to complaint)

Rules Governing

THE MERCER COUNTY DEMOCRATIC

CENTRAL COMMITTEE

adopted 1971, amended 1982

1. Qualifications: Any registered Democrat may serve as a member of the Mercer County Democratic Central Committee.

2. Membership: The Central Committee shall consist of the following members:

a. The Chairperson, Vice Chairperson,

Secretary, Corresponding Secretary and Treasurer of the Mercer County Democratic Committee;

b. The State Committeemen and Committeewomen elected as prescribed by Title 19 of the Revised Statutes and residing in Mercer County;

c. All Municipal, county, State and Federal elected officials who reside in or represent any part of Mercer County and are registered Democrats, except elected municipal clerks and tax collectors;

d. Persons from each municipality in Mercer county pursuant to Section 3 below and the following formula:

I. two seats shall be awarded each municipality for each increment of 5,000 population, as determined by the most recent federal census;

II. two bonus seats shall be awarded each municipality for each increment of 10

percent by which the votes cast for the highest Democratic vote-getter in each municipality exceeded, on average, 40 percent of the total vote in each of the three most recent general elections; and

III. no municipality shall have fewer than two seats regardless of population or Democratic vote;

e. provided that they be registered Democrats, the County Superintendent of Elections, members of the County Board of Elections and one representative from each of the following organizations: Trenton Polish-American Democratic Club, Black Democratic Caucus, Hispanic Democratic Caucus, Democratic Women's Division, and Young Democrats;

f. Up to twenty-five (25) additional persons appointed by the Chairperson pursuant to Section 4 below;

g. The Chairperson of the Trenton

Municipal Committee and of any other municipal committee hereafter organized by wards.

3. Selection of Municipal Representatives: Beginning in 1983, no less than two thirds of every municipal delegation, as referred to in Section 2d above, shall be elected by the local Democratic organization charged with the selection of delegates, subject to the section of these Rules concerning disputed seating. Local club officers who serve as delegates ex officio, pursuant to local rules, shall be considered "elected" for purposes of this section. Nothing herein shall prevent a local organization from choosing to elect more than two thirds of its delegates.

If municipal groups cannot agree as to the method of selection of representatives (authorized by Section 2d, above), elected

Committeemen and Committeewomen shall choose one half. Representatives with half votes may be chosen only if necessary to ensure the one half representation referred to above.

Each municipality may choose alternates to serve in the absence of regular representatives. The alternates must be chosen in the same manner and in conformance with the same criteria as the regular representatives; and the number of alternates shall not exceed the number of regular representatives. Substitution of alternates for regular representatives, when necessary, shall be done at the sole discretion of the head of the local delegation determined by local rules, except only elected alternates may be substituted for elected representatives as long as elected alternates are available, and any substitution shall take into

account affirmative action criteria. Only alternates chosen and submitted to the Chairperson pursuant to these Rules may be substituted for regular representatives. Only delegates registered to vote at a particular meeting and present at the time a particular vote is taken shall be entitled to participate in that vote.

4. Appointments by the Chairperson. In order to recognize the contributions of groups that may not be represented by the elected Committeemen and women nor by the duly recognized organization of any municipality, the County Chairperson may appoint up to twenty-five (25) additional persons to the Central Committee. Said Chairperson shall solicit the advice of the recognized leaders of the group being given the appointed position or positions and may appoint a committee to assist him in this function. In addition, the

Chairperson shall appoint an alternate for each representative to serve in the absence of the regular representative.

In making appointments the Chairperson shall to the best of his or her ability meet the male/female and affirmative action requirements set forth in Section 5 below.

The Chairperson's appointments must be submitted within thirty (30) days after the municipalities submit the names of their delegates. Replacements for these appointments shall be made only upon resignation, death or change of status.

5. Affirmative Action. Each municipal delegation shall be comprised of 50 per cent women and 50 per cent men as required by the rules of the National Democratic Committee. Each municipal delegation also shall reasonably represent the percentages of black and hispanic population segments in each municipality as indicated by the

most recent federal census.

6. Credentials Subcommittee. The Chairperson shall appoint a standing Credentials Subcommittee, consisting of no fewer than ten (10) persons, who shall on an annual basis (a) review the selection and composition of each municipal delegation for compliance with these Rules, before the delegation or any part of it is confirmed as members of the Committee; and (b) establish the number of bonus seats to be assigned each municipality and, when appropriate, the number of seats based on population.

If the Credentials Subcommittee finds by a majority vote that the selection or composition of any municipal delegation or the group appointed by the Chairperson fails to conform with the requirements of these Rules, especially with respect to affirmative action and procedures for

selection, the Credentials Subcommittee shall recommend corrective action to the full Committee. Corrective action may include the exclusion from any meeting of all or part of any delegation, the substitution of new delegates, or such other remedies as the Committee deems most likely to assure compliance with these Rules. Final action on the recommendation of the Credentials Subcommittee shall be decided by a majority vote of the full Committee, exclusive of any group which is the subject of a recommendation. The Credentials Subcommittee shall communicate its recommendations to affected local groups and the Chairperson before any meeting of the full Committee to permit an opportunity for voluntary corrective action.

7. Adjustments to Municipal Base Membership. A municipality which

experiences a substantial increase or decrease in population between census years shall have the right to request an adjustment of its base membership determined by population pursuant to Section 2(d)(I) above.

8. Disputed Seating. In the event of a dispute regarding the identity of the recognized Democratic organization or organizations in any municipality, or any dispute regarding the method of selecting the representatives to the Central Committee, the groups or persons involved in the dispute shall promptly inform the County Chairperson of the dispute. The Chairperson shall then investigate into the dispute and recommend a settlement. Any person or party affected by the recommended settlement may then have the dispute presented to the entire Central Committee, (excluding those whose seats are in

dispute, if any) which may overrule or alter the recommended settlement by a two-thirds vote of the members present at a duly called meeting.

9. Terms.

a. The terms of members referred to in Section 2 a, b, and c, shall be co-extensive with the terms of their respective offices.

b. All other members of the Central Committee shall serve for one year or until successors are chosen or elected, with terms commencing on February 1 of each year.

10. Vacancies. Vacancies shall be filled for the unexpired portion of the term only and in the manner in which the original selection was made.

11. Chairperson. The County Chairperson shall be he presiding officer of the Central Committee.

12. Purpose. The purpose of the Central Committee is to endorse candidates for County, State and Federal offices in the Democratic Primary in Mercer County, to the extent permitted by law. Unendorsed candidates may be entitled to run in the same column with the endorsed candidates but may not use the same slogan. The Committee shall adopt such rules as it deems necessary to accomplish this purpose, consistent with full and fair consideration of all potential candidates.

13. Candidates to be considered. Any person eligible to run for office in the Democratic Primary may speak to the Committee and request its endorsement at any meeting held for the endorsement of candidates. The time allowed for such speeches shall be determined by the Chairperson, who in making such determination shall consider only the total

number of persons seeking to speak and the time reasonably required to complete the business of the meeting. All such speakers shall be given equal time.

The Chairperson shall publicize the date, time, place and purpose of any endorsement meeting and invite all persons interested in endorsement to contact the Chairperson and to present themselves at the meeting. All persons who inform the Chairperson of an interest in endorsement shall be supplied a copy of the names and addresses of all known members of the Endorsement Committee, subject to a reasonable charge for copying.

Notwithstanding the right of all potential candidates to speak before the Committee, only those persons who are thereafter nominated and seconded from the floor, by persons eligible to vote at the meeting, shall be considered for

endorsement.

14. Voting by Committee; Secret Ballot; Nominating Speeches. The first candidate(s) for any office to receive the votes of more than 50 percent of the registered delegates shall be the endorsed candidate(s) for that office. In the event no candidate for an office is endorsed on the first ballot or fewer candidates are endorsed for a particular office than the number of seats available there shall be a runoff between the top two candidates for each unendorsed office or seat. If for any reason no candidate for a particular office or seat can receive the vote of more than 50 percent of the registered delegates, the top two vote-getters for the office or seat shall be treated as if endorsed.

When an office has more than one seat available the number of votes cast by each delegate for that office generally shall

correspond to the number of seats available. However, on motion made and seconded and carried by voice vote, each seat may be considered separately as if a separate office.

Any candidate failing to be endorsed shall be entitled on request to an additional ballot. If on this additional ballot the candidate receives the vote of at least 30 percent of the registered delegates, the candidate shall be entitled to run in the same column as the endorsed candidates but without the same slogan. A vote of greater than 50 percent on the additional ballot shall not entitle any candidate to be endorsed.

With respect to all offices or seats for which there is a contest, the vote shall be conducted by secret ballot.

Whether there shall be nominating or seconding speeches, and the length of such

speeches, shall be determined by the Chairperson, except that in any contested race each nominator shall be entitled to speak for no less than three minutes.

15. Registration of Delegates. Every delegate (including voting alternates) present at any meeting shall be identified and registered by name, address and signature. The total number of delegates so registered shall be the denominator of any fraction used to determine a percentage vote pursuant to these Rules.

16. Date, Time and Place of Meetings: Notice. The date, time and place of all meetings of the Endorsement Committee shall be determined by the Chairperson subject to the following limitations:

(a) all known members of the Endorsement Committee shall receive notice of any meeting in a writing mailed no later than the 13th day before the date scheduled

for the meeting; and

(b) No meeting shall be scheduled later than the 5th day before the last day for the filing of candidates' petitions.

17. Submission of Delegates and Alternates. Each municipality shall submit to the Chairperson a list of the names and addresses of all its regular and (30) days after receipt of all such lists, the Chairperson shall submit the lists together with the names and addresses of his or her appointments to the Credentials Subcommittee. Within this same period of time the Chairperson shall compile a master list of delegates and alternates and distribute copies of same to municipal chairs and club presidents.

VERIFICATION

State of New Jersey
County of Mercer

I, STEPHEN A. KOCZAK, plaintiff in the above-entitled action, being first duly sworn state that I have read and subscribed to the foregoing complaint, and the facts set forth therein are true and correct.

/s/ Stephen A. Koczak

(Notary)

VERIFICATION

I, JOHN G. RESCH, plaintiff in the above-entitled action, being first duly sworn, state that I have read and subscribed to

the foregoing complaint, and the facts set forth therein are true and correct.

/s/John G. Resch

(Notary)

VERIFICATION

I, KATHERINE E. ROTTER plaintiff, in the above-entitled action, being first duly sworn, state the I have read and subscribed to the foregoing complaint, and the facts set forth therein are true and correct.

/s/ Katherine E. Rotter

(Notary)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AFFIDAVIT

STEPHEN A. KOCZAK, et al.

Plaintiffs

v.

G. DALLAS DIXON, et al.

Defendants

State of New Jersey

County of Mercer

Stephen A. Koczak, of full age being duly sworn according to law upon his oath, deposes and says that:

1. I am one of the plaintiffs in the above referenced matter, and I make this affidavit in support of my application for a temporary restraining order.

2. I have personal knowledge of the facts set forth herein and, if called as a witness, I could testify competently thereto.

3. I am at present a registered Democrat, a resident of Trenton, New Jersey and a duly qualified candidate for the Democratic nomination for member of the U.S. House of Representatives from the fourth district of New Jersey.

4. I have found the procedures of the defendant Central Committee whose membership consists of, inter alia, the officers and members of the defendant county committee as well as representatives from area municipalities, elected Democratic officials who either reside in or represent Mercer County and 25 additional persons appointed by Chairman Dixon, to be window dressing for the manipulation of the primary process by a small number of incumbent officials and functionaries of the Mercer County Democratic Party.

5. As a direct result of the manipulation

of the primary process by the defendants, the selected Democratic standard bearers are given preferential treatment in terms of funding publicity and the like. In short, the establishment and operation of the endorsement scheme as more fully set forth in the Complaint filed herein contravenes the mandate of an open and free primary process, the importance of which was recognized by the New Jersey state legislature when it enacted N.J.S.A. 19: 34-52.

6. It is further my understanding that the printing and distribution of the sample ballots for the June 3, 1986 primary will take place within the next week or two.

7. On April 2, 1986, the defendant central committee met and endorsed the candidacy of defendant Laurenti. It is my understanding that defendant Laurenti and the other candidates who have received

similar endorsements, have asked that their names on the ballot be accompanied by a slogan identifying them as the "Regular Democratic Organization" candidates.

8. In the event that the aforesaid ballots are distributed to the public my candidacy will be irreparably harmed by this manipulated endorsement of my rival since I am running without the endorsement of the local democratic party and organization; and my campaign will be prejudiced thereby in the eyes of the electorate. Accordingly, I respectfully request that the temporary restraining order prayed for the the Complaint issue pending a hearing on plaintiffs' application for a preliminary injunction.

/s/ Stephen A. Koczak

(notary)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

STEPHEN A. KOCZAK, et al.,

Plaintiffs,

v.

G. DALLAS DIXON, et al.,

Defendants

This matter being opened to the Court by Brener, Wallack & Hill attorneys for the plaintiffs on telephone notice to Counsel for the various defendants, and the Court having considered the duly verified Complaint, the Affidavit of plaintiff Stephen A. Koczak, and the arguments of counsel and good cause having been shown;

IT IS ORDERED that:

1. Defendants G. Dallas Dixon, the Mercer County Democratic Committee, the Mercer County Democratic Central Committee,

Jeffrey Laurenti, Howard Kaye, Gerard Stockman, Louise Lomma, their agents, employees, successors, attorneys, and all those in active concert or participation with them from organizing and operating the Mercer County Democratic Central Committee or any other similar committee or organization with the purpose of screening, nominating or endorsing a candidate or candidates for office in the upcoming Democratic primary elections in Mercer County prior to the happening of said primary, or from otherwise actively participating in any manner whatsoever including, without limitation, holding meetings, making public statements, publishing materials or using party assets in the aforesaid primary election campaign on behalf of a particular candidate or candidates, except as individuals acting as individuals.

2. Defendant Jane Burgio, Secretary of State of New Jersey is restrained and enjoined from placing or printing on the ballot for the June 3, 1986 primary election any slogan or statement which identifies, indicates or implies in any manner whatsoever the endorsement by the defendants Mercer County Democratic Committee, Mercer County Democratic Central Committee or by the "regular" Democratic county organization of a particular candidate or candidates.

3. Defendant Jeffrey Laurenti is restrained and enjoined from submitting or prosecuting any such slogan or statement to or with the defendant Secretary of State, Jane Burgio, or from displaying, publishing or communicating such a slogan or statement on signs, press statements or in campaign literature which identifies, indicates or implies that defendant Laurenti is endorsed

by the defendants mercer County Democratic Committee, Mercer County Democratic Central Committee or by the "regular" Democratic county organization.

4. Defendant W. Carey Edwards, Attorney General of New Jersey and Thomas H. Kean, Governor of the State of New jersey are commanded to enforce the state statutory scheme as written with regard to the regulation of the election of Senators and Representatives in Congress.

5. The defendants show cause before this Court, at the Federal Courthouse, Trenton, New Jersey on _____, the _____, day of _____ 1986, at _____ o'clock __. m. or as soon thereafter as counsel can be heard why a preliminary injunctive order should be issued enjoining and restraining the defendants in the same manner as the temporary restraints provided for hereinabove.

6. The temporary restraints contained in this order shall expire on the return date hereof but not exceeding 10 days from the issuance of this Order, unless within such time the Order is extended for good cause shown, or unless the defendants consent to an extension.

7. A copy of this order shall be served on the defendants hereinbefore mentioned within _____ days from the date hereof by the United States Marshall.

/s/

Date:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SUPPLEMENTAL AFFIDAVIT

STEPHEN A. KOCZAK, et al.,

Plaintiffs,

V.

G. DALLAS DIXON, et al.,

Defendants

State of New Jersey
County of Mercer

STEPHEN A. KOCZAK, of full age being duly sworn according to law upon his oath, deposes and says that:

1. I am one of the plaintiffs in the above referenced matter, and I make this Affidavit in support of plaintiffs' application for a temporary restraining order and preliminary injunction.

2. I believe that the electoral procedures utilized by defendants Dixon and the Mercer County Democratic Central

Committee are false and misleading for the following reasons:

3. When I began considering seeking the candidacy for the office of Member of the House of Representatives from the Fourth New Jersey Congressional District, I was made aware that the laws of New Jersey forbade a county or municipal party committee from endorsing candidates prior to the primary.

4. When choosing the slogan, or text, to appear after my name on the ballot, I selected the three words, "Regular Traditional Democrat," so as to indicate that I had not been endorsed by the Mercer County Democratic Committee or party organization.

5. I was not aware, nor were the Democratic registered voters who indicated they would sign my qualifying petitions aware, of the existence of a separate

Democratic Central Committee, the purpose of which we later discovered was to nominate and endorse candidates prior to the primary in circumvention of the New Jersey election laws.

6. I first learned of the existence of the Central Committee and of the fact that the Committee had endorsed my opponent, Jeffrey Laurenti, at its convention on April 2, 1986, from newspaper accounts of the convention and of a lawsuit filed by Gertrude Dubrovsky in the New Jersey Superior Court challenging the actions at the Central Committee, which report appeared in the local papers on April 3, 1986.

7. I telephoned Gertrude Dubrovsky to ascertain the facts and later communicated with her attorney to ascertain whether I should join that suit to assure "standing." I was told my participation was not

necessary since "standing" was not an issue.

8. I understand that the convention of the Democratic Central Committee was moved forward from April 16 to April 2, 1986 and that no advertisement was placed in the press to invite any potential office seekers to appear before the convention. Accordingly, only the inner circle of the Mercer County Democratic party leadership was aware of the convention being called to nominate Jeffrey Laurenti. There being no opposition to his candidacy, Mr. Laurenti was endorsed by acclamation.

9. I did not realize until April 14, 1986, when I saw for the first time a copy of a letter brief filed by Mark Setaro, Esquire, attorney for G. Dallas Dixon and the Democratic Central Committee in the state court action that the constitutionality of N.J.S.A. 19-34-52

would be challenged by the defendants therein. At that time, I was told that the matter was to be taken up at a hearing on April 22, 1986.

10. It is further my understanding that the Judge in the Dubrovsky case did not specifically address the issue of the constitutionality of N.J.S.A. 19: 34-52, nor the other constitutional issues raised in this matter in ruling on plaintiffs' application for a temporary restraining order and preliminary injunction.

11. I immediately proceeded to seek legal counsel conversant with the Constitutional issues involved, particularly Article 1, Sec. 2, Cl. 1, and Article II, (sic) Sec. 4, Cl. 1.

12. I learned that Laurence Elgin, Esquire, was reputed to have expertise in these matters and on April 28, 1986, three working days after I learned of Judge

Levy's decision dissolving the Order to Show Cause, I engaged Mr. Elgin to prepare the instant lawsuit.

13. Since Mr. Elgin is not admitted to practice in the Federal District Court of New Jersey, I subsequently communicated with Mitchell Neider, Esquire, of Brener, Wallack & Hill to request that he act as local counsel.

14. Because of the complexity of the issues involved, both Mr. Elgin and Mr. Neider worked assiduously to prepare the pleadings in this matter. I repeatedly urged speed on them and they assured me that they were proceeding as rapidly as possible.

15. I firmly believe and will so testify that I have proceeded with the greatest celerity to bring my Complaint before the Federal District Court once I had been able to discover the fraud and deceit which had

transpired.

/s/ Stephen A. Koczak

(notary)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CIVIL ACTION

DOCKET NO. 86-1856 REC

NOTICE OF MOTION FOR A STAY OF THE JUDGMENT OF UNITED STTAES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(Caption)

PLEASE TAKE NOTICE THAT plaintiffs Stephen A. Koczak, Katherine E. Rotter and John G. Resch by their attorneys Brener, Wallack & Hill, Joel D. Rosen and Mitchell Neider appearing herewith move this Court for an Order:

1. Staying the judgment of the United States District Court for the District of New Jersey dismissing the above entitled matter for want of a federal question pending appeal to this Court.

2. Enjoining certain unconstitutional election practices as well as the primary election scheduled to be held on June 3,

1986.

3. For such further relief as the Court may deem equitable and just.

This motion is based on the Memorandum of Points and Authorities and the Affidavit of Counsel served and filed herewith.

Brener, Wallack & Hill

/s/ Joel D. Rosen

/s/ Mitchell Neider

Dated: May 29, 1986

MOTION TO DISMISS

Letterhead of:

COHEN, SHAPIRO, POLISHER, SHIEKMAN & COHEN
150 West State Street
Trenton, New Jersey 08608

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(caption)

TO: Mitchell Neider, Esquire
BRENER, WALLACK & HILL
2-4 Chambers Street
Princeton, New Jersey 08540

PLEASE TAKE NOTICE that on May 21, 1986, at 4:00p.m., or as soon thereafter as counsel can be heard, Leonard Fishman, Esquire, of the firm of Cohen, Shapiro, Polisher, Shiekman and Cohen, appearing for Defendants mercer County Democratic Committee and G. Dallas Dixon, will move this Court at Courtroom No. 2, United States Court House, 402 East State Street, Trenton, New Jersey, as follows:

1. To dismiss the action because the Complaint for Declaratory and Injunctive

Relief and for Damages for Violation of Constitutional and Civil Rights (the "Complaint") fails to state a claim against the Defendants upon which relief can be granted.

2. To dismiss the action on the ground that the Court lacks jurisdiction over the subject matter.

3. To dismiss the action on the ground that Plaintiffs' request for relief is barred by the equitable doctrine of laches.

At the hearing of this motion, the Defendants will rely upon the letter brief attached hereto and made a part hereof.

COHEN, SHAPIRO, POLISHER, SHEIKMAN & COHEN
/S/ Leonard Fishman, Esquire

EXERPTS FROM TRANSCRIPT OF
INITIAL HEARING, MAY 12, 1986

MS. KELLY-BOCCHER: June 3rd, your Honor.

THE COURT: June 3rd. All right. I don't know whether it is in your brief for the moving party, but injunctions being of the, of there -- of necessity, equitable in nature, I have to recognize that you just may, even if you are entitled to relief, number one, have waited too long, because the complaint certainly relates that there are facts here which were known or certainly should have been known by you long before the very eleventh hour, the eve of election, and for me to, a week from tomorrow, if I ruled in favor to disrupt a primary election, would be quite a happening. Let's put it that way.

And secondly, the relief here is primarily based on the violation of a State

statute, and I am not too sure, and I have not read the cases that you are going to brief me with and so forthe, but just from the top of my head, and I am not ruling and I am not making any decision, I am very concerned that if what you say in this complaint is true, that you should not be before a State Court judge, since it does not make out a violation of 1983, 1985, to say that a State statute has been violated, therefore, you are being denied due process of law, equal protections, or whatever else. ...

...

THE COURT: Well, I will deem the complaint amended as of this time to include him as a party defendant. You are to file an order to that effect. And you can serve him along with an amended complaint at a later time, for present purposes, I will entertain your application and grant amending the complaint to include him as a party defendant. You will have to also serve him. All right.

But what I said previously still is of some concern to me, the ballots, the horse is out of the stable almost and we are looking to close the barn door here.

MR. NEIDER: I am advised by my client, your Honor, that in addition to Mercer County, the district covers three additional counties, and so accordingly, it would be necessary to join the clerks of three additional counties.

THE COURT: What are the other counties that the --

MS. KELLY-BOCCHER: The 4th Congressional District includes Monmouth, Middlesex and Burlington.

THE COURT: All those clerks have to be -- and the motion is granted as to each of those three as additional party defendants. Submit an order to me, and I will sign it. And at a leter date, we will amend the complaint.

MS. KELLY-BOCCHER: It may also include Ocean County. I don't know that for a fact, but the plaintiff should obviously check that out.

CAPTION

ORDER TO SHOW CAUSE

Trenton, New Jersey
May 21, 1986

BEFORE: THE HONORABLE ROBERT E. COWEN, U.S.D.J.

APPEARANCES:

BRENER, WALLACK & HILL
BY: MITCHELL NEIDER, ESQ., and
LAURENCE A. ELGIN, ESQ., (D.C. Bar),
For the Plaintiffs.

W. CARY EDWARDS, ATTORNEY GENERAL,
BY: DONNA KELLY-BOCCHER, D.A.G.,
For Defendants Governor Kean, Secretary of State, Attorney General of New Jersey.

PAUL T. KOENIG, ESQ.,
For Defendant Mercer County Clerk

GLEN FILIPPONE, ESQ..
Assistant Burlington County Prosecutor,
For Defendant Burlington County Clerk.

LEONARD FISHMAN, ESQ.
For Defendant Jeffrey Laurenti.

MARK SETARO, ESQ.,
For Defendant Jeffrey Laurenti.

WALTER BLISS, ESQ.,
For Defendant Gerald Stockman.

THE CLERK: In the matter of Koczak, et al., vs. Dixon, et al., 86-1586. Please make your appearances for the record. For the Plaintiffs.

MR. NEIDER: Mitchell Neider of the firm Brener, Wallack and hill appearing as local counsel on behalf of the plaintiffs.

MR. ELGIN: Laurence A. Elgin, appearing as counsel entered pro hac vice on behalf of plaintiff aling with Mr. Neider.

MS. KELLY-BOCCHER: Donna Kelly-Boccher, Deputy Attorney General for defendants Governor Kean, Attorney General Edwards and Secretary of State Burgio.

MR. FISHMAN: Leonard Fishman, Cohen, Shapiro, for defendants Dixon and the Mercer County Democratic Committee.

MR KOENIG: Paul Koenig, Jr., Mercer County counsel on behalf of Mercer County Clerk Albert Gerard.

MR. SETARO: Mark Setaro on behalf of

Jeffrey Laurenti.

MS. FILIPPONE: Glen Filippone, Assistant Solicitor for Edward Kelly, Burlington County Clerk.

THE COURT: All right. Gentlemen and ladies, I have read all of the moving and opposing papers. Let me ask, there is also a motion filed to dismiss. Do you want to consolidate and hear all these matters in one fell swoop? I assume the defendants do. Is the plaintiff of that mind as well?

MR. ELGIN: We, of course, have not, let me state for the record, we have not had an opportunity to oppose the dismissal motion, but we will waive any objection.

THE COURT: All right. In other words, we will deal both with the, with your application for a preliminary injunction as well as for defendants' cross-motion for dismissal.

MR. ELGIN: Yes. I would ask the Court

that if the dismissal motion should be granted, that we be permitted to file a brief subsequently in order to have something to appeal on, some opposition to it.

THE COURT: No, I am not going -- I am either going to hear it or not going to hear it. I am not going to hear it and rehear it based on briefs filed subsequently. I am prepared, I have read every piece of paper in the file that has been submitted. If you don't want me to hear the motion to dismiss, I will not hear it.

MR. ELGIN: Okay. We will waive the objection, your Honor, too, and consolidate.

THE COURT: So, as I understand, all parties are in agreement that not only will I hear the application for a preliminary injunction, but I will hear the cross-

motion to dismiss. Is that correct? If there is any deviation from that, please voice your objection. Hearing none, then I am going to bring on for hearing both applications.

All right, The main problem, quite frankly, I have with this case and I believe I expressed it when it was originally brought in on a TRO application, was that I would like to hear the plaintiffs speak to that with a little bit more clarity. Of course, I am appreciative of the Federalist papers. I have read what you have given to me, I read them in college, but we are not dealing in history here, we dealing in law, and even a new judge like myself doesn't want to get reversed. Let's put it to you that way.

Would you tell me specifically what the predicate is for federal jurisdiction to issue an injunction or even hear this

matter.

MR. ELGIN: Yes, your Honor. I will. A State statute which regulates the times, places and manner of electing Senators and representatives in Congress is not a State statute like any other. Such a statute is unique in the federal system. It is passed pursuant to delegated federal authority, authority that is delegated by the constitutional provision we have cited, Article I, Section 4.

The authority is thus delegated as part of the foundation of our federal system, and without that delegation, Congress itself, of course, would by national laws set the procedures for electing its own members as do the State legislatures by law at the present time

So when a State legislature passes a comprehensive statutory scheme such as Title 19 of the New Jersey Statutes

Annotated governing all races within the State for both State and federal offices, only the portions of that scheme that deal solely with races for State office are just State law. Those parts of Title 19 of the New Jersey Statutes Annotated which regulate the times, place and manner of electing members of the national Congress are first and foremost federal law.

THE COURT: Let me see if I understand you correctly. What you are saying then in effect is that the State election laws which have been passed by this State, for that matter any state, when applied to Congressional or Senatorial elections are federal laws?

MR. ELGIN: Yes, your Honor.

THE COURT: All right. I understand your position.

MR. ELGIN: It is not correct to say, (as Mr. Justice Miller said, for the unanimous

Supreme Court in 1884 in the case we have cited, Ex Parte yarbrough,) that the right to vote for a member of Congress does not depend on the Constitution of the United States. The office is created by that Constitution and that alone. Mr. Justice Miller then went on to say it also declares how it shall be filled--by election.

In the same opinion, in Ex Parte Yarbrough, which is 110 U.S. 651, at 663 and 664, page 660, he points to the power of Congress to regulate those elections under the times, places and manner clause. The delegation itself, of course, is in that clause and also in Article 1, Section 2, which is one of the sections that we cite extensively in our brief.

But if we grant that these things are mandated in this clear language in the body of the Constitution, the Court asks, is there a right to the benefit of the rights

secured by those two provisions, which was violated here so as to give the plaintiffs the cause of action which they claim?

I will argue in a moment the case authority which shows clearly that there is; but before doing that, we do want to point out one thing about the times, places and manner clause in particular which is essential to understanding how fundamental is the plaintiffs' cause and how serious these breaches of their constitutional rights are.

We refer the Court to the report on the statements of James Madison which we quote in our brief, in which he spoke of this clause, the times, places and manner clause, and of the delegation of the authority to the State legislators, saying that; "It was found necessary to leave the regulation of these. (the times, places and manners of electing Senators and

Congressmen) in the first place to the State governments as being best acquainted with the situations of the people." He then added, according to the reports of the constitutional debates, that this was, "subject to the control of the general government," (referring to the federal government,) in order to enable it to produce uniformity and to prevent its own dissolution..."

"Were they," he said, referring to these powers, "exclusively under the control of the State governments, the general government might easily be dissolved." This of course is from Farrand's Records of the Federal Convention, Volume 3, page 311, as quoted by the Supreme Court in U.S. v. Gradwell, 243 U.S. 476 at 484.

In other words, this power is delegated to the legislators of the states as the embodiment of the people's will and their

State governments', but subject always to the oversight and correction of Congress as the national representative body carrying out the national will. And this ability of Congress to oversee and when necessary in the national interest, to override the election laws of the states as they govern federal Congressional races, was deemed by the framers to be the glue binding the national union. Without this glue, as Madison said, the union might easily be dissolved.

Now, and this is the basic point of this whole present controversy, what if this power of Congress to oversee and, where necessary, recall this delegated federal power, is interrupted and cut off. What if even a small portion of the power to regulate the times, places and manner of electing members of Congress is taken from the State legislators against their will, and against the will of those who elect them. The people of the several states? How then can Congress oversee and recall the power thus wrested from the legislators against their will?

And so we have here a specific enactment of the legislature of New Jersey being circumvented. The Legislature has said to the political parties that they shall operate through certain official committees. It has decreed that these committees shall neither endorse a

candidate before the primary, nor finance any particular candidate, one against the other, within the party, before the primary. It has said you shall come to the starting line equal.

THE COURT: Well, the State has not denied that this is a valid subsisting statute, and I am not aware, from reading through the papers, that you have been foiled or in any way rebuffed at any application to require the defendants to heed to that statute. Isn't that correct?

MR. ELGIN: If I understand what your Honor has said, I would have to respectfully disagree. We feel that our clients, particularly our candidate client, has been disadvantaged by the very type of endorsement which the Legislature sought to prevent.

THE COURT: No. No, I think I may not be making myself clear or you are not

understanding my question.

MR. ELGIN: All right. I will try again.

THE COURT: My question is this. No one denies that this is the spoken policy of the State of New Jersey, and that it is a requirement for those who are in the elective process to follow. My question to you is, what makes this a federal case? No one in the State has said that this is not the State policy, we do not allow endorsements prior to the primary. As a matter of fact, the State has said in black and white that we prohibit them, and what rights are being denied that give rise to federal jurisdiction?

The State has said that what you are seeking, if it fits within the statute, is what you will obtain if you go into State Court. How do you first come to Federal Court on this claim?

MR. ELGIN: Well, because it is delegated

to federal authority and because, this is the point I was getting to, and because if this power which is shared by Congress and the State legislators and delegees is circumvented, the power of Congress as well as the State legislators is circumvented by this, this circumvention.

THE COURT: Couldn't the circumvention be cured, if indeed it is a circumvention, by going into State Court?

MR ELGIN: That might be the case, your Honor, but we would maintain that there is federal jurisdiction as well, because there has been, and we have cited in our brief a case of Smith vs. Allwright.

THE COURT: I don't see that that is exactly an point.

MR. ELGIN: Well, it is on point in this regard, that case involved predecessor statutes of the very ones we are suing under here.

THE COURT: We are not dealing with the same factual ---

MR. ELGIN: Not the same factual pattern but as to the question of whether there is federal jurisdiction for the violation of those rights secured by Article I, Section 2, and Article I, Section 4, both the Smith v. Allwright case, and also another case we have cited, Ex Parte Yarbrough, way back 100 years ago, in 1884, a little more than that, which also involved a predecessor statute of those we sue under, both said that those, the rights secured by those constitutional provisions, Article I, Section 2 and Article I, Section 4, when violated, give rise to federal jurisdiction under the civil rights statutes stemming from the Reconstruction times.

THE COURT: Under the factual -- but the factual predicate was different than the case before the Court here.

MR. ELGIN: That is true. I am citing it for the general proposition that these two provisions in the body of the COnstitution do give rise to secured rights which can be defended if violated and that violations of them can be prosecuted under the Civil Rights Acts. I understood the Court to ask that question.

THE COURT: All right. And the nub, of course, of your position is that a violation of any State election law concerning federal elections, federal elected officials, would give you a right to go into federal court in the first instance.

MR ELGIN.: That's right. And there is a further argument which I will give your Honor, and that concerns our 1st and 14th Amendment claims. I mean, let me deal first with the 14th Amendment claim, which is, of course, the Equal Protection

Clause. What we are saying there is quite simple. Once the State Legislature has proscribed pursuant to the constitutional mandate of Article I, Section 4, the State legislature has made the reasonable classification that can be made, any additional classification or alteration of the weight of votes or the degree of, say, an individual's say in the election of the candidate or the nomination of the candidate, is a scheme which the legislature has not proscribed, and therefore, it is per se violative of the equal protection that the legislature has decreed.

And the same is true for our First Amendment claims, freedom of association -- not mentioned in, but emanating from the First Amendment -- which concludes that the freedom of political association is a collation, if you will, of the First

Amendment rights of expression, as protected by the Due Process Clause and the right to speech and assembly as it pertains to political activity and the rights to petition for redress of grievances.

One way is to elect your candidate and have hopefully your programs carried out. Again, once the State legislature has proscribed, for a private body to change that proscription violates these rights. Once the proscription is set under the delegated federal authority by the legislature of the state, then just as in Yarbrough, with the statutes punishing criminal violations threatening, and so forth of the State election laws in that case, that becomes a federal right. Even though it is embodied in State law, that is a federal right.

THE COURT: What you are saying is that, and I am playing devil's advocate here at

this time, is that by reason of the violation of the defendant of State law, that you are being denied your due process and 14th amendment and First Amendment rights. Correct?

MR. ELGIN: That's correct.

THE COURT: I do not see how you ....

MR. ELGIN: I am not sure I understand your Honor's comment. Are you asking, are you asking or stating that there is no denial here that empowers the plaintiffs to go into federal court because they might get similar relief in the State Court on their federal rights?

THE COURT: I am saying, number one, any violation of the State law, let's take it out of not just the elective process but any State law touching upon something which has an association with the federal government, does not automatically mean that you are being denied due process,

equal protection, first or some other right.

MR. ELGIN: Of course not.

THE COURT: All right. And insofar as being denied those rights, I don't see how you are being denied them because if you prove the merits of the claim which you make here, those rights would not be denied. There would be no denial of those rights. There is a process by which those rights can be vindicated. I am not arguing concurrent jurisdiction. I am arguing to you, or stating to you, that had you been denied any federal right when the State has a remedy for the wrong which you claim is being committed.

MR. ELGIN: Plaintiffs' federal rights have been violated and may go to either forum. This goes way back, let's take an old case we have used, 1886 Yick Wo vs. Hopkins, the question of the ordinances in the city of San Francisco violating 14th Amendment rights because of the way they were administered or not administered to

varying groups. The same is the case here. Now, then our plaintiff clients discovered the by-laws of the central committee-it appeared that they were enacted in 1971. So for many years now, this practice has been going on. And we have cited the negligence part of the civil rights statutes. What have the State officials done to stop it? It appears that they are allowing it to happen and they know it is happening and yet is has been happening still, and they have done nothing about it.

THE COURT: I don't see that you have made State officials aware of something which is absolutely a violation of this statute from which they have turned -- to which they have turned a deaf ear.

MR. ELGIN: Are you saying that we should have sought extra-judicial remedies with the State officials?

THE COURT: I am saying I don't see there

is any denial here of anything, since if you are correct in your position that this central committee is just a way of getting around the statute, you are not being denied anything since the State, if they agree with your position, will remedy that situation and you will be denied nothing. You will not be denied First Amdnement political association, equal protections or anything else.

MR. ELGIN: Well, it is my understanding, forgive me if I am wrong, in a somehwat similar case in State courts, a plaintiff was -- well, of course it did not involve a U.S. Congressional candidate, but the essential evasion of the statutory scheme was the same and the relief was denied.

THE COURT: What case are you speaking of? I am not aware of any that was brought to my attention. And I researched it, I researched it independent of what was given

to me.

MR. ELGIN: Mr. Neider was the counsel in that case, I believe, your Honor. Maybe he can address it.

THE COURT: I will be pleased to hear it from him.

MR. NEIDER: Your Honor, there is a case currently pending in the New Jersey Superior Court in the Chancery Division in Mercer County entitled --

THE COURT: I don't read the Reports that thoroughly.

MR. NEIDER: Well, in fact there is no, there has been no reported decision issued at this point, the procedural status, the procedural status, the procedural status of the matter is that a complaint has been filed. Plaintiffs made an application before the Honorable Paul J. Levy for a temporary restraining order and additional injunctive relief, the theory being that

the Central Committee and the committee--well, the Central Committee was in fact the alter ego of the Mercer County Democratic Committee, and consequently, and endorsement, preprimary endorsement by the Central Committee was in violation of the State statute.

At this point in time the Judge has denied plaintiffs application for injunctive relief, and that is where the case stands at this point in time. Discovery is in the pretrial discovery phase. The judge has indicated that if the cases do continue, that there will be a pretrial conference and then a trial.

THE COURT: All right.

MR. ELGIN: What I was referring to, your Honor, is what Mr. Neider described as injunctive relief was denied in that instance, on the sole point, as I understand it, from reading Judge Levy's

opinion, that one committee was not exactly the alter ego of the other, that is to say, there wasn't exact congruence in membership, and I do not, of course, in our argument we do not consider that as the dispositive point.

THE COURT: I would agree with you.

MR. ELGIN: It seems to me it does indicate that perhaps the avenue of relief in the State Courts is not as open as your Honor would suggest here, particularly of course where a Congressional candidate is concerned.

THE COURT: All right. Anything else before I hear from the defendants?

MR ELGIN: Yes. There were several other questions raised by your Honor in addition to the federal jurisdiction question.

THE COURT: How about the laches problem? We are on the eve of election here, and the defendants claim they have already spent their money and printed their necessary papers, and while not acknowledging that they are doing anything wrong, they say that what they have been doing was not a secret, that you have known about it many, many months ago and that it is grossly

unfair for you to come into court when the die is already cast in the election, in effect.

MR. ELGIN: Well, let me respond to that. We have alleged that of course the plaintiffs did not know of these matters and the voting -- the general voting membership of the Democratic party did not know that this was going on.

THE COURT: I have to assume by the moving papers that you filed that you knew about it for quite some time.

MR. ELGIN: I think we have --

THE COURT: Or your client, put it that way.

MR. ELGIN: I believe we filed a supplemental affidavit of our client and he only discovered it when he read about the Levy proceeding, not the --no, the Dubrovsky proceeding before Judge Levy in the newspapers. This is when he first

discovered this was going on. Our client, he says this in his affidavit, he read the statutes and assumed they were being obeyed, I think as a citizen, I think as a citizen is entitled to do.

THE COURT: Well, I took it as a factual matter that, and I am not saying that what the defendants are doing is proper or improper, but whatever they are doing, I certainly came away from these papers with the thought, now I might be in error, that it was well known that the Central committee existed and that while the membership was not exactly the same, that there was a great deal of similarity, and especially in higher echelons of the committees.

MR. ELGIN: Well, of course what we are referring to in the supplemental affidavit is that our clients discovered this within recent weeks, because of the Levy

proceeding being covered -- I mean the Dubrovsky case, being covered by the newspapers, and they immediately moved to do something about it. They communicated with the plaintiffs in that case, attended, (our candidate plaintiff), attended the hearings involved and the constitutional question was raised there almost in the same form it is raised in the brief filed by Mr. Fishman before us now, and yet when he went to the hearing I believe on the 22nd of April the constitutional question was avoided and the entire matter was disposed of with regard to equitable relief on the basis of --

THE COURT: When did your client know of the endorsement by the Central Committee?

MR. ELGIN: The endorsement?

THE COURT: Yes, he knew about that several, many, many, many weeks ago, months ago. I think it was, you know, several

months ago he knew about it.

MR. ELGIN: Your Honor, I don't think we covered that and perhaps it was an oversight in the affidavit of my client, my plaintiff client -- my candidate client informs me he learned of it when he read of the endorsement in connection with the proceeding before Judge Levy. He has told me previously, and I believe we have this in the affidavit, I first learned of the, quoting from the affidavit, of the existence of the Central Committee and of the fact that the committee had endorsed my opponent, Jeffrey Laurenti at its convention of April 22, 1986, from newspaper accounts of the convention and of a lawsuit filed by Gertrude Dubrovsky, new Jersey Superior Court, challenging the actions of the committee report appeared in the papers on April 3rd, 1986.

THE COURT: All right, let me ask you, I am

sure the defendants are going to raise the point, the expense involved in printing the ballots and so forth, what do you have to say about that?

MR. ELGIN: Surely, could I finish on laches?

THE COURT: No problem, certainly.

MR. ELGIN: I am sorry.

THE COURT: Please do.

MR. ELGIN: I wanted something on the record.

THE COURT: Yes.

MR. ELGIN: Laches is an equitable doctrine and the burden is on the party that asserts it, and of course, we have two maxims in equity that operate here. One, you must come into equity with clean hands, and second, he who seeks equity must do equity.

We would assert that when you -- and we have a case supporting the use of those

maxims in the Circuit from new Jersey, that is Neely, N-e-e-l-y, vs. Merchants Trust Company of Red Bank, 113 F. 2d 953, which mentions both of those maxims of equity -- we would maintain that there is no equitable right to continue with activities that essentially evade both the State statute and a constitutional mandate. There certainly is no such right in this circuit to cite one of the cases that they cite in bringing up laches, the University of Pittsburg vs. Champion Products, Inc. That case dwells on two questions: delay and prejudice to the defendants - let me speak to delay for a minute.

One of the elements in that question is : is there a statute of limitations that has been violated. of course there are no statute of limitations here where basic consititutional rights are involved. And secondly, they speak of, in that case which

involves a trademark situation: is there an abandonment; has there been an abandonment of the right over this time?

Here there has been no abandonment. Our clients just discovered their rights were being violated and acted fairly promptly.

Going on to the prejudice, which is the damages, or the cost of reprinting the ballots, that your Honor mentioned.

THE COURT: And the deadline of the election.

MR. ELGIN: And the deadline of the election which is soon upon us. I think that the Court should take into account, with all respect, a balancing of the equities, and we have been given here, we have just received material we received yesterday and today, the cost estimates by the various county clerks, but I note that the attorney, Assistant Attorney for Ocean County who filed, indicated that the

actions of his county clerk were purely mandatory. He was just carrying out the decision of the defendant state officials.

And in balancing, of course we have to consider the cost to both sides. Now, the other side, in one of the briefs filed has made light of our claim that there are publicity costs. I find that astounding in this day and age. If necessary, we can get a media consultant expert who worked some political campiagns. But I call the Court's attention to the fact that it is well known that campaigns and media costs are very, very expensive. And what is the cost of overcoming this, what we maintain is an illegal endorsement practice and, it has a cost. I mean, the candidate who seeks to go against it; against this practice has to buy the publicity, the exposure to make up for that free exposure from the endorsement.

Just to refer to something that is, you know, something the Court can recognize: the Federal Election Campaign Act, for example, passed in 1971, had a limit on expenditures for House campaigns of $168,000. at that time it was considered reasonable. That was struck down in Buckley v. Valeo, a case we cited in 1976 by the Supreme Court, and it is well known in the figures from the Federal Election Commission show since then the average cost has gone to more than twice that, some are up over a million dollars now.

So this is not cost-free to the party who is damaged by the improper practice. And in fact I would maintain that the cost to our client to overcome this will be greater thatn the cost to the State of redoing these ballots. But then again there is a question of: is there a right to continue an unconstitutional practice, if it is

unconstitutional as we allege, because of this cost? I mean, in other words, is there an argument: "we have gotten away with it thus far, we should get away with it a good bit further."

Many of the cases we are citing come out of the civil rights movement. I was involved in that in a minor way and those arguments were tried there and they were not listened to. The fact for almost a hundred years, for example, in Mississippi they had been able to keep black people off the voting rolls so they couldn't be on the jury list - you couldn't get them on juries - so you had to reprint all the lists and redo everything. That wasn't considered a valid argument for not correcting the constitutional violations. And I don't think it should be here.

I don't think there is a right to keep on doing it, in effect, simply because -- and

let me point out for the record, your Honor - that whatever notice they had or did not have, a good bit of what is going on here, according to these affidavits, is what they are continuing to do after they have received their copies of the moving papers and our complaint, and it seems to me at the very least they should be extremely circumspect and not just keep on doing these things without thoroughly examining whether or not they are in compliance with the State statute and the federal Constitution and the Federal Civil Rights Laws.

THE COURT: All right. Let me hear from the defendants, please.

MS. KELLY-BOCCHER: Very quickly, your Honor, there is no federal jurisdiction in this case. I have looked at the moving papers, and I see no federal question. I see no allegation that any constitutional

rights have been or will be violated by the alleged illegal conduct of the private party defendants.

THE COURT: Well, they say that their political rights are being abridged and that their equal protections are being abridged because they are not being treated equally as anyone else who is vying for a position in the primary. And that is a violation of the 14th and First Amendments.

MS. KELLY-BOCCHER: When you are talking about an equal protection problem you are talking about some kind of statutory classification which impermissibly classifies like people.

THE COURT: No, they are not saying that there is a suspect class. They are saying that in the manner in which the defendant has gone forward, that the effect is to create two classes, primary candidates with and without endorsement. I am just

paraphrasing.

MS. KELLY-BOCCHER: I understand that. But the way in which candidates are nominated in the primary elections in our State is through -- is in the polling place, on Election Day, by all the qualified voters who are members of that political party and there is absolutely no allegation in this case that the voters on June 3rd, who are the members of the Democratic party, or opt to become members of the party on Election Day, will not have equal weight in terms of who they wish to nominate. All the votes will be equally counted. There is absolutely no allegation of any dilution of vote, or that anyone is being deterred from even getting into the polling place. I think that is the -- that should be the relevant inquiry for a federal court in terms of looking for any type of constitutional violation regarding

voting rights.

And what they are complaining about here may well be a violation of a State law. I do not take a position on that question, because I think that question should be addressed in the state court, not in the federal court.

THE COURT: All right. You disagree with plaintiff that the State election laws which react and provide for federally elected officials are not federalized.

MS. KELLY-BOCCHER: I don't understand the logic of that argument, your Honor. The State statute which is at issue here is a statute that was enacted by the State Legislature to apply to all of our elections in the State, federal, State, county, local or otherwise. The 10th Amendment clearly gives the power to the states to promulgate election laws. It is a statute promulgated or enacted by the State Legislature with the signing of the Governor.

I don't see how that translates into a federal statute to get oneself into federal court, particularly when, as I stated before, I see absolutely no allegation here that anyone's federally protected constitutional rights have been violated, because if they had, we would have had a sense of that, certainly the State's position would be different. But based on

the papers of the plaintiffs, I don't see that.

THE COURT: Maybe they are being violated but you are not perceiving that. Plaintiff puts it this way, that his federal rights are being violated because he wants to be a federal official, but by reason of the manner in which the State law is being administered, or not being administered, he is unable to vy for a position with people who are in violation of State law. Therefore, what could be more federal than the inability to get elected or to vote for someone for federal office on equal terms, and with equal endorsements?

MS. KELLY-BOCCHER: That may be a political problem for the plaintiff. I don't see it as being a constitutional problem. The plaintiff has been duly certified, he is on the ballot. He is not being restricted in any manner to conduct

his campaign as he sees fit, to even go to tell the voters of the 4th Congressional District that my opponent is violating State law by this endorsement. And the other problem I have --

THE COURT: Just a minute. What do you mean he is not being restricted? He is in a 100 yard dash with lead weights around his feet. He is running for election, and the name of the game is who is in back of you, who your supporters are, who your endorsers are.

MS. KELLY-BOCCHER: That is a political matter for him to go out and get support however he chooses.

THE COURT: But the support is from a primary, is from a committee which is not supposed to endorse anyone until the primary comes in and then we all in the party endorse the party's candidate.

MS. KELLY-BOCCHER: And that is what will

happen on June 3rd, your Honor. All the qualified voters of the 4th District will have the right to go into the polls and it is the winner on that day who is going to be placed on the general election ballot in November.

THE COURT: But he says the results of that election are pre-ordained because he is running this race without, or let's put is this way, his opponent is running the race with the endorsement which is going to make him look not as handsome a candidate as someone who has the endorsement of the Democratic party for Mercer County.

MS. KELLY-BOOCHER: I sincerely believe that does not translate into any federal matter for this Court, and the other problem I have in terms of there even being State action here, is that I am not too sure I understand the nexus between the alleged illegal endorsement and the relief

that the plaintiffs are seeking. They want the slogan of Jeff Laurenti to be stricken off of the ballots, but yet our State law provides, as the State has set forth in its brief, that whoever comes in first with a slogan, and if it is not in effect owned by any incorporated association or it mentions the name of a person, that individual is entitled to use that slogan on the ballot. And furthermore, that a candidate has a right to ask to be grouped with other candidates in terms of bracketing. Now, Mr. Koczak did not -- chose not to use the slogan, besides the fact that he also factually, according to the affidavit of George Bloom, submitted his nomination petition within hours of Mr. Laurenti, but he chose not use that slogan, and how -- the manner in which Mr. Laurenti presented his petition with a slogan, as it has been reviewed by the Secretary of State's

office, there was no violation of State law to permit the Secretary to --

THE COURT: He was first to come with the name so it is his trademark.

MS. KELLY-BOCCHER: So to speak. And I really do believe that the State has met its burden of its laches defense in this matter, beyond the fact that I don't believe that this is a matter properly for State Court. The supplemental affidavit submitted by Mr. Koczak clearly states he knew April 3rd, beyond the fact that the complaint said we have known for years that this Central Committee has been endorsing candidates.

THE COURT: Yes.

MS. KELLY-BOCCHER: And he, as a candidate, knew about the filing deadline, he must have known about the drawing deadline and he did nothing, and now we are one week away from the requirement under

State law that sample ballots be sent our to all the voters to allow them a week to review the ballot for purposes of making their decisions to vote.

I think the burden that will be placed on the county election officials is absolutely unwarranted. I mean, in Mercer County alone, the deputy county clerk stated if I had to redo all of my ballots, sample, absentee and the machine strips, it would cost the county $61,499. What they are asking us in effect is to jeopardize compliance with other State statutes. The requirement that sample ballots be sent out by next Wednesday.

Mr. Kelly of the Burlington County Clerk's Office indicated that cannot be done if I have to go back to the printer to have them change the sample ballot. We have already -- some counties have already had their candidate's inspection of the machines.

That was done yesterday in Middlesex County. If Middlesex County had to redo its 34 machines, which they contend they could not do in time, that now jeopardizes whether or not we can have a candidate's inspection and all the candidates who are on the ballot for the 4th Congressional district have to see the machines before they are locked and sealed.

And this also threatens unnamed parties to this action, because the ballot does not simply have Congressional candidates on it. There are local seats, there may be county seats, there may be State seats. None of those people have been notified. Even the Republican Congressional candidate who certainly has an interest here, he is not -- he also, his rights have also been threatened, and he is not here in court to give his piece, so to speak.

It us just unjustified, your Honor. It

this were a case where they had a real claim, that would be one matter. If it was a federal claim, that would be one matter, but there is no federal constitutional rights being violated, according to their own allegations of the plaintiffs, and it is just too late to ask the election officials in the 4th Congressional District to just throw everything out and really waste taxpayers' money, without there being any just cause.

THE COURT: All right.

MR. FISHMAN: Your Honor, I want to make a point of not repeating the points that Ms. Kelly Boccher has already addressed, but I want to address myself specifically to the leading argument that I think counsel for the plaintiff has made, which is that somehow the United States Constitution pursuant to Article I, Section 2 delegates the federal election process to the states,

whereas your Honor has put it, federalizes the State election process.

What that article says is, "The House of Representatives should be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

Now, what Congress has done, or what the federal government has done through the United States Constitution is not delegate federal election authority. It adopts certain State regulations. What is says is, to the states, State of New Jersey, when you tell you citizens how they are going to elect a general assembly, the popular branch of government, those same requirements for electors shall apply to members on Congress, and that is it.

The federal government knows how to pass regulations to regulate federal elections when it wants to. It did that at Smith vs. Allwright, and Gomillion vs. Lightfoot, in Ex Parte Yarbrough, for example. In Ex Parte Yarbrough, the Supreme Court made the point that I had just made, which is that the federal government says we are going to adopt the qualifications for electors of the most numerous branch for our House of

Representatives.

The problem with plaintiff's argument is that is proves too much, because if plaintiff's argument is sustained, then New Jersey's election law, the whole thing, becomes federal law. Multiply this by 50 state statutes, because what plaintiffs are arguing is any time a State statute having to do with elections is violated, automatically, a candidate for federal office can point to that violation and say, well, it applies to candidates running for Congress, and therefore, it is a violation of federal law and raises federal jurisdiction.

I don't think that is what the U.S. Constitution had in mind. It selected particular regulations that should be applied both to state law and federal law, not all regulation, certain regulations. For example, qualifications fo electors of

the most popular -- for the House, or the most popular branch of government on the State level. I think that is as far as it goes.

For that reason, I think as I said, that not only does plaintiff's argument prove too much, but it would have the exact opposite impact that the Supreme Court was reaching in Ex Parte Yarbrough. In Ex Parte Yarbrough, the Supreme Court said we consider that there is an adiption of certain provisions by the federal government. Otherwise, every State will be free to run its own show.

What plaintiff's interpretation would result in is 50 seperate federal election laws, and that would truly deprive the federal government of a cohesive election process. In a couple of instances, there is a diffused -- there is some diffused responsibility in the federal level, and

not to beat a dead horse, in the matter that is at issue here, the federal government has done that with respect to the qualifications for electors of the House of Representatives. The plaintiff has not cited a single case that suggests that it is a violation of federal law to allow preprimary endorsement.

Now, the State of New Jersey has done that. It is clear, for example, the plaintiffs cannot bring this action in a federal district court, or a state court in Rhode Island, or in Connecticut, or in other states where not only are preprimary endorsements permitted, preprimary endorsements are promoted by the statutes there.

And defendants in our brief have cited some cases on point. For example, we cited the case of Gallant vs. LeFrance, which was a Rhode Island case, Rhode Island Supreme Court. There the statute expressly permitted and fostered pre-primary endorsements by the party committee. In fact, the statute there went so far as to say to the party committees, let the Secretary of State know who you endorse. We are going to put an asterisk next to their name so voters know who the endorsed candidates are in the primary election.

THE COURT: That doesn't necessarily make it constitutional, if it is a federally recognized violation.

MR. FISHMAN: That's correct, but your Honor, all a party can do is point to some precedent. Here is a case that said we are going to review whether this is a violation of federal Constitution. The

answer of Gallant vs. LeFrance was no. The issue rose again in Gage vs. Petrocie, again the Rhode Island Supreme Court.

Specifically the question was raised whether that procedure violated the Equal Protection Clause of the United States Constitution. Rhode Island Supreme Court says no. The issue was raised again in Fahey vs. Darigan. I am quoting cases that plaintiffs were kind enough to recite in their brief. In Fahey vs. Darigan, United States District Court for the District of Rhode Island, the Court reviewing the Rhode Island statute again said that the endorsement process is private, not public action, and therefore, the Equal Protection Clause of the 14th amendment is not implicated.

I would also point out that a Republican Party of Connecticut vs. Tashjian which was a case in the Second

Circuit, the Second circuit, Court of Appeals, the election law there was remarkably similar to the rules of the Mercer County Democratic Central Committee. Their endorsements were made through party conventions that endorsed candidates and a candidate who did not receive the endorsement was permitted to have runner-up status and to run in the primary election in opposition to the endorsed candidate. But there, if there was no opposition candidate there wasn't even a primary election held.

The point that I have tried to make by citing these cases, you Honor, is that the issue that the plaintiffs have come to this Court to raise has been raised before, and courts that have heard the issue have held that the endorsement process is private, not public, and they have held that there is no federal question

presented, at least to the extent it was raised in those cases, by a pre-primary endorsement. The states are free to choose whether there is going to be a prohibition or not against pre-primary endorsements.

New Jersey in its wisdom has chosen to prohibit them, although prior to 1930 they were not prohibited and for a couple of years, when 19:34-52 lapsed, again they were not prohibited in this case. I suppose it is plaintiff's position that the State of New Jersey was in violation of the federal, or the United States Constitution during the couple of years that the statute was lapsed.

I don't think that that point is sustainable, and I don't think that states that choose a scheme different than the one New Jersey has chosen are in any way in violation of the federal Constitution. What that means is that if a plaintiff

thinks that 19:34-52 has been violated then the place to get relief is in the court of the political jurisdiction that conferred that right, and the jurisdiction that conferred that right is the State of New Jersey, and it did it completely without regard to federal constitution or statutory rights.

And I think it is untenable to say that the federal government automatically adopts what New Jersey does with respect to its election laws, because as I said before, your Honor, if that is the case, we now have 50 federal election laws across the United States and I don't think that that is what the framers, or Congress had in mind.

In connection with, I just want to point out also that along the line of cases that have been referred to by plaintiffs, for example, Smith vs. Allwright, Gomillion

vs. Lightfoot, those cases dealt with deprivation of the right to vote or beating and/or intimidation or so on in violation of federal statutes, and in relation of the federal Constitution. Clearly you may not stop someone from voting and that would be a violation of federal law.

But again, the scheme erected by the individual states for pre-primary endorsements, yes or no, is a matter within the domain of each state. I am not going to deal with the laches arguments because I think that Ms. Kelly-Boccher has dealt with it more effectively than I could, but I want to add one piece of information, your Honor, in terms of the laches argument.

In the complaint it is suggested that plaintiff was aware that this process was going on for a long time on and annual basis. The supplemental affidavit says April 3rd. This matter, or a similar

matter was brought by another plaintiff in State Court, and the State Court was not impressed with the evidence as to the merits, namely, whether there was a violation of 19:34-52.

There is no reason that these plaintiffs, thinking a federal right had been violated, could not have come to this Court immediately if they learned upon that date that their federal rights had been violated. It is hard to believe that any Democrat in the county of Mercer, particularly one who rises to run for the United States House of Representatives is so little informed about how this, how a county political process operates as to become aware of it by reading it in the newspapers.

Be that as it may, assuming the supplemental affidavit to be true, still, a month and a half has passed since that

violation, or the alleged violation came to the attention of plaintiffs. So I just think that on its equitable doctrine of laches, that relief ought to be denied.

I think also that the plaintiffs have failed to state a claim upon which relief can be granted here because the relief the plaintiffs are asking for, which is to strip a candidate of his slogan is unrelated to the contention that an endorsement was made in violation of the statute. If we assume arguendo that candidate Laurenti was improperly endorsed, that is not translated to his slogan.

In fact, we have the ironic situation that the plaintiff Koczak tells us he picked a slogan because he wanted to make sure that nobody misunderstood that he was separate from the Mercer County political party. Well, he had the slogan that he wanted and this action in court no doubt is

reinforcing that opinion in the press, and that is his right. But it is also candidate Laurenti's right to chose a more conventional slogan, namely, regular Democratic organization.

As your Honor may know, it is typical on election, a contested primary election for candidates to choose one or the other because both are hugging the position that they have some relationship to the Democratic party organization, and that of course is permissible provided that they are not using a slogan that has been used by some other entity.

On that point, I want to make one last point. In the complaint, there is a tremendous confusion between the Mercer County Democratic Committee and the Mercer County party organization or the Dallas Dixon party organization. the only entity that is regulated by 19:34-52 is the Mercer

County Democratic Committee. If politicians in this court or activist democrats or a combination of the two get together to support candidates from a primary election they have a First Amendment right under the United States constitution to do that.

I think plaintiffs have not taken the trouble to sort out the various political entities in this county and that is critical. Because as the Court said in Gillen vs. Sheil, when you are looking at a statute that tells people that they may not meet to express their political beliefs as 19:34-52 does, it better be construed very narrowly.

And what plaintiffs here are trying to do is to paint the supporters of Chairman Dallas Dixon, and activist Democrats and Mercer County Democratic committee with the same brush and that is

simply inappropriate because the statute doesn't say that active Democrats may not meet to discuss political issues or endorse candidates. That would be a violation of constitutional rights. It says the county committee that is set up by statute may not meet, and it was that point that plaintiffs early, earlier plaintiff was unsuccessful in sustaining in the Superior Court law division. I think that covers the points I want to cover that have not been covered by Miss Kelly Boccher. Thank you.

THE COURT: Anything further from the defendants? Let me put it that way.

MR. BLISS: I am Walter Bliss, attorney for Senator Gerald Stockman. I appreciate your indulgence.

THE COURT: No problem, Mr. Bliss. I received your papers.

MR. BLISS: Thank you very much. Your Honor, certainly as to the Senator, I

have mixed feelings in pointing out to the Court, of course, as a Senator he is not a Democratic committee person. His compliance are not compliance with the endorsement statute. It does not bring into question his activity, per se and no specific duty charged to the Senator has been alleged to have been violated, or, nor has the Senator been alleged to be derelict in any way. I would request reluctantly because I think the merits are important, that regardless of the outcome of today's proceedings, the Senator be relieved of the burdens of further participation, except as an interested citizen together with the other citizens and Democrats of Mercer County.

As to the merits, your Honor, Mercer County Democrats have been struggling with the issues of endorsements and the role of the Mercer County Central Committee for some time. Senator Stockman has been very much in the center of that and will continue to be part of that debate.

But this suit fundamentally confuses the right to endorse or the lack of it with the right of candidates to run on a slate. If the clock could be turned back, and if the endorsement meeting of last April could be prohibited, could be wiped from the slate of history, so to speak, you would still have the same slate before you today on the, and on the ballot today regardless of the actions of that group. It is a form of ballot question. It goes to a specifically authorized right of candidates, any three or more candidates in the State to run together, as a slate, with a slogan of

their choice, given to them on a first come first served basis, as they arrive in the courthouse.

Whether the committee that met last April was properly endorsing a candidate or not goes to the whole issue of pre-campaign exposure, it goes to the fact that the candidates endorsed there got a morning's worth of free press the next day, but it does not go to whether or not those same candidates who at all times retained their own personal rights to slate themselves in any way they chose, the -- whether that endorsement or one day of free press of the pre-campaign recognition was lawful under State statutes does not overrule or does not pre-empt another State statute which permits this ticket precisely as it is presently constituted. Thank you, your Honor.

I certainly am impressed as a Democrat

with the presentation fo the counsel here today for the Mercer County Democratic Party, but I would request special consideration for the Senator's position, whose participation in this proceeding, formal participation is burdensome and I request a dismissal certainly as to his cause.

THE COURT: Anything in response that you would like to say shortly?

MR. ELGIN: Yes. Starting with the last first, Senator Stockman: the allegation is quite clear he is the man who moved the endorsement in the unofficial Central Committee.

THE COURT: And he is a member of the committee.

MR. ELGIN: He is a member of that unofficial Central Committee though admittedly not a member of the official committee. Going back to the m, proceeding

to the argument of Mr. Fishman, he only mentions Article I, Section 2, I suggest he read further to Section 4, there is a delegation.

THE COURT: Section 4, we are under Article I, Section 4. Other sections are -- have some interest, of course.

MR. ELGIN: Yes. We have cited the definitive case on that as Smiley vs. Holm, 1932, a unanimous opinion by mr. Chief Justice Hughes. The argument in that case was that the delegation only meant what the legislators did, it didn't include a gubernatorial veto. The Supreme Court said it did, it included everything.

So it is a delegation, and I would point out: this was the tail end of the argument I started with, that the implication of that then is quite clear, quite startling: That means that if a party group like the Central Committee can get around that, the

State restriction, then if Congress passes the law, say Congress passes the law nationwide for getting preprimary endorsements, all the parties can --

THE COURT: Congress has not spoken to preprimary endorsements.

MR. ELGIN: It has not. Supposing it has. When they eliminated starting with eliminating different election duties , going on to uniform dates with Congressional elections in the 1870's, coming up to the Buckley vs. Valeo case, pulling back power - Congress takes. Buckley vs. Valeo discusses that.

I won't get to the Rhode Island cases except to mention the Rhode Island Legislature chose to keep the endorsement process private. The New Jersey legislature has chosen the opposite. It is entitled to do so.

An endorsement is an official act, with

authority, and we cited Smith vs. Allwright, followed by many cases, that comes ultimately from the state. It is not a private function like it was a refreshment committee or something. This is the electoral function. The Tashjian case we have cited, again, I ask my opponent to read that. Connecticut is one of three states that does not use the primary to select its nominees. It uses a system, which the Legislature has passed, of conventions.

The key point, though, and this is one that seems to have fallen by the wayside here, is that what we have here is a classic deception. if I may make an analogy, it is like Government Employees Insurance Company, as it started out, now known as GEICO because the federal authorities stepped in when GEICO creates subsidiaries; the federal government

stepped in and said: "people believe that you are part of the federal government and that is why they are buying your insurance."

Now, let's not fool ourselves. These people don't want themselves on the ballot as G. Dallas Dixon men. They want themselves on the ballot as the candidates of the organization, meaning the organization of the Democratic party. And that is a deception here.

The legislature has spoken to the point, and they have evaded the point. The statutes of New Jersey that allow for the grouping, and bracketing and other things on the ballot, they spoke to the factions that can group together, people who have the same philosophy, two or more candidates for the same office with the same philosophy is one of the statutes, people with the same policy (that might be they

are for or against an issue,) but that is not the same thing.

What we are talking about here is representing themselves and holding themselves out to the ordinary voters as the candidates who are backed by the party itself, through its only official organization, the city, county and town committees. And let's look at the facts here. Again, federal courts are empowered, when constitutional rights are involved, to look independently into the facts as impacted upon by the State statutes.

Let's look at the facts. The very similar name, one word is different, the overlap in leadership, the substantial overlap in membership, (whatever the final number is) operating out of the same offices, operated by the same people. Who knows the difference? One man said to me, when I was working on this case up here that he had

been on one of these committees and he never knew which committee he was meeting with at the meetings.

We have here today Mrs. Dubrovsky, the plaintiff in the State Court proceeding we have mentioned. If your Honor has any question on this point we would offer her as a witness to give us a brief statement.

THE COURT: We are not taking testimony. This is an application on cross-motions. This is not, we are not taking testimony.

MR. ELGIN: At any rate, I wanted to conclude by saying that this is a very basic set of rights that we feel are secured by these constitutional provisions, and they clearly are federal rights under the cases we have cited, and certainly with regard to 14th Amendment.

I think if there is a First Amendment right, people can get together and make a formal endorsement on behalf of a party,

that Mr. Fishman ought to enlighten us as to the authority for that, because I have search for it and I have cited all the cases I can find that are close to the point, and I don't see any that say that. It seem to me that the framers of the Constitution made a very deliberate choice here. They had before them the example of the British systems in particular, where the parties did absolutely control nominations.

Then we also had La Follette's reforms at the turn of the century that led to New Jersey statute in 1903 and all the others of the time, the follow-up reforms that made the primary, as I say, in all but three states the way the nominees were chose by the parties. And this is simply an erosion of those rights. It is a diminution, if you will, under Reynolds vs. Simms.

We have cited Baker vs. Carr, when the Supreme Court entered the political thicket. Ever since then all these cases concerning the weight of voting. We think the right is so fundamental. Even though it is not a barring of ballot access it is a basic handicap on the campaign of the nonendorsed candidate that is in defiance of the prescription of the Legislature.

THE COURT: All right. I understand your position.

Give me one second here, please.

(pause)

THE COURT: This is a case concerning the Mercer County Democratic Committee and the Mercer County Democratic Central Committee. Before the Court are plaintiff's motion -- is plaintiff's motion for preliminary injunction, and by consent of all parties, even though defendant has filed a motion out of time, defendant's cross-motion to dismiss for lack of jurisdiction and for other reasons.

The essence of plaintiff's complaint is that the Mercer County Democratic Central Committee is the alter ego of the Mercer County Democratic Committee, and since New Jersey law prohibits the latter from endorsing primary candidates, it may not do so through the former.

It is the Court's decision that while plaintiff may have a claim under State law,

I fail to see how he has stated a claim under State law, I fail to see how he has stated a claim under federal law upon which relief can be granted, under the motion to dismiss filed by defendants. Plaintiff refers continually to the delegated federal law. Apparently what plaintiff means by this is State law governing the conduct of Congressional elections which the states are allowed to enact pursuant to Article I, Section 4, of the United States Constitution.

I reject the plaintiff's argument since -- since if I accept it, it would have the rather absurd result of making all state election laws when applied to the Congressional or any federal election federal law.

I want to add that it certainly is true that Congress has the power to override State laws governing Congressional or

Senatorial elections, but this unexercised power does not federalize existing State laws which are enacted for the purpose of electing these officials.

For the reasons that I have cited, I cannot grant plaintiff's ad interim or injunctive relief since not only don't they have a -- not only have they failed to demonstrate that they will prevail ultimately on the merits, but I think it has been demonstrated that they cannot prevail on the merits in this matter. Not only should I, I want to point out, are the -- is the likelihood of success remote, or I should say nonexistent, but the equities are strongly against the plaintiff in this matter, as has been demonstrated in the defendant's briefing and affidavits, the fat is already in the fire, if I can use a popular term, the ballots have been arranged for, the printing has been done,

is scheduled to be done.

We are at the eleventh hour, the eleventh minute of the eleventh hour, and I find as a matter of fact from this record submitted to me that the plaintiff certainly knew or at the very least should have known of the existence of the -- well, there is no question he knew of the existence of the Central Committee, but I fail to understand his position in the supplemental affidavit that he only knew of this endorsement procedure and so forth until very, very recently.

It would be extremely costly to reprint these ballots at this point, and as I have mentioned, I think the plaintiff has delayed bringing this action long after he knew of the endorsement and I find for the record, indeed, the complaint itself, that he had knowledge of the procedure.

I think I should also endorse as part of

my decision that it is worth noting that there is no necessary connection between the endorsement which plaintiff challenges and the slogan on the ballot which plaintiff seeks to remove. Rather, it has been demonstrated to me that a candidate who wishes to use a slogan simply submits that slogan before any other candidate submits the same slogan, and if the slogan has not been taken up, the candidate is entitled to the slogan.

All right. Lastly, I should indicate that for the record that it has been some time since this matter was filed with the Court to today, when I have brought this matter on for hearing, but in large part that was caused by the failure of the plaintiff to file a brief with the moving papers. I attempted to do some research myself on the Sunday following the Friday that the papers -- late Friday that these papers were filed

with me. I was unable to come up with any cases in point. Indeed, research by defendants and further research by myself has failed to reflect that this Court is the forum for the relief sought by the plaintiff.

Lastly, I am not in any way passing on the merits of the plaintiff's complaint. He may well have a cause of action in State Court, and my dismissal is totally without merits, and it is for the jurisdictional reason which I have expressed. Because I have dismissed the federal claim, I am also dismissing without prejudice the pendent State Court claims which have been also part of the complaint filed in this matter.

Gentlemen and lady, whether your are satisfied or dissatisfied with the Court's resolution of this matter, that is not the question I am asking you, but is there anything else which is necessary for the

Court to do to dispose of this matter at this time? Plaintiff?

MR. NEIDER: No, your Honor.

THE COURT: Defendants, thatoncludes the matter.

MS. KELLY-BOCCHER: Yes, your Honor.

THE COURT: I will ask the Attorney General to submit an order. Please in your letter of transmittal represent to me you have read it to your co-defendants and the plaintiff and they consent to the form of the order or if they do not, set forth their position.

MS. KELLY-BOCCHER: Yes, your Honor.

THE COURT: Thank you. It has been a pleasure to have you argue this well briefed and well litigated matter. Good day.

(Adjourned at 5:45 p.m.)

(3)

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-1079

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

STEPHEN A. KOCZAK, KATHERINE E. ROTTER, and JOHN G. RESCH,
Appellants,

v.

G. DALLAS DIXON, THE MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE, JEFFREY LAURENTI, HOWARD KAYE, GERALD STOCKMAN, LOUISE LOMMA, JANE BURGIO, W. CARY EDWARDS, THOMAS H. KEAN,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

---

Appendix Vol. II

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Joseph F. Shanahan
Lambertville, N.J.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

STEPHEN A. KOCZAK, KATHERINE E. ROTTER, and JOHN G. RESCH,
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W. CARY EDWARDS
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Trenton, New Jersey 08625

By: DONNA KELLY-BOCCHER
Deputy Attorney General
(609) 292-1500

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CERTIFICATION IN OPPOSITION
TO PRELIMINARY INJUNCTION.

STEPHEN A. KOCZAK, et al.,

Plaintiffs,

v.

G. DALLAS DIXON, et al.,

Defendants.

GEORGE H. BLOOM, JR., being aware of the penalties for perjury, certifies to the Court, pursuant to 28 U.S.C. §1746, that the following statements are true and correct:

1. I am the Supervisor of Election Administration, Division of Elections, within the Department of State of New Jersey. My duties are to assist the Secretary of State in the performance of the responsibilities imposed upon her by Title 19 of the New Jersey revised Statutes.

2. The primary duties of the Office of the Secretary of State with respect to primary elections conducted within New Jersey are as follows. The Office accepts for filing the nomination petitions for federal and State offices. Upon acceptance of such petitions, the Office certifies the names of the candidates to the county clerks for printing of the ballots. The Secretary of State has absolutely no legal authority to print ballots.

3. Pursuant to N.J.S.A. 19:23-17, a candidate for a primary election is

permitted to include within his or her petition, a slogan or designation for printing on the ballot which states the candidate's policies or party faction affiliation. If the slogan contains the name of a person or reference to an incorporated association within the State, written consent of such person or association must accompany the petition. In the Commercial Registration Division of the Secretary of State's Office, incorporated associations are able to file with the Secretary specific designations which are for their exclusive use, unless another party is specifically permitted to use it.

4. On June 3, 1986 a primary election will be conducted in New Jersey, which will include elections for all the congressional districts within the State. The fourth congressional district includes

the Counties of Burlington, Mercer, Middlesex, Monmouth and Ocean. The last date for filing of nomination petitions was April 10, 1986.

5. On April 10, 1986, at 11:05 a.m. a petition nominating Jeffrey Laurenti for the Democratic primary election for the fourth congressional district contained the slogan, "Regular Democratic Organization," following the candidate's name.

6. On April 10, 1986, at 12:39 p.m., the nomination petition of Stephen A. Koczak was filed for the same congressional primary election. The petition included the slogan of "Regular Traditional Democrat."

7. The Commercial Registration Division of the Department of State has no record of any corporate filings on behalf of the Mercer County Regular Democratic Organization or any other similar name.

8. I know of no reason why a candidate would need a written consent for the use of the slogan, "Regular Democratic organization." Where written consent is not required for use of a slogan, the first candidate who submits it with his or her nomination petition is entitled to its exclusive use on the ballot.

9. The nomination petitions of Laurenti and Koczak were accepted by the Secretary's office and pursuant to N.J.S.A. 19:23-21, their names and representative slogans were sent to the five county clerks of the fourth congressional district for printing on the ballot. Thereafter, the Secretary has no legal authority regarding the manner and method of the ballots nor does she have any supervisory power over the county clerks.

GEORGE H. BLOOM, JR.

DATED:

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for State Defendants
Richard J. Hughes Justice Complex
CN 112

By: DONNA KELLY-BOCCHER
Deputy Attorney General
(609) 292-1500

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CERTIFICATION IN OPPOSITION.
TO PRELIMINARY INJUNCTION.

STEPHEN A. KOCZAK, et al.,

Plaintiffs,

v.

G. DALLAS DIXON, et al.,

Defendants.

AUGUST BRUSCHINI, being aware of the penalties of perjury, certifies to the Court, pursuant to 28 U.S.C. §1746, that the following statements are true and correct:

1. I am the Deputy Superintendent of

Elections for the County of Mercer, State of New Jersey. My office includes responsibility for custody and preparation of voting machines.

2. Ballot inserts for the June 3, 1986 primary election have already been received from the Mercer County Clerk. The 254 voting machines which have been allocated for use in municipalities within the Fourth COngressional district for the primary election have been fully prepared, except for the insertion of ballot strips. That task is to be completed on or about May 15, 1986.

3. The candidates' inspection session under N.J.S.A. 19:48-6 has been scheduled for Tuesday, May 27, 1986, between 10:00 and 11:00 a.m.

4. The voting machines will be transported to the polling places beginning immediately after candidate inspections are

concluded on May 27.

5. If the machines had to be reset in the warehouse where they are presently located, the job would take seven to eight days of regular time (three eight-hour shifts per day) and cost about $1500. With round-the-clock work, the time might be shortened but the cost would be substantially greater.

6. I cannot begin to estimate the time and costs that would be involved in resetting the machines in the field. We have never had to reset all of the machines before, and the variables, such as travel time and the ability fo gain access from landlords, etc., make even a "guesstimate" impossible.

AUGUST BRUSCHINI

DATED:

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

Vicinage of Trenton

Civil Action
File No.

STEPHEN A. KOCZAK, et al.,

Plaintiffs,

vs.

AFFIDAVIT

G. DALLAS DIXON, et al.,

Defendants.

STATE OF NEW JERSEY :
: ss.
COUNTY OF MERCER :

TED M. YIM, of full age, affirms according to law deposes and says:

1. I am Deputy County Clerk for the County of Mercer. In this capacity I have the responsibility for the preparation of the ballot in all elections including the

primary election scheduled for Tuesday, June 3, 1986.

2. Pursuant to a request from Dave Demby I researched the status of the ballots for the afore-referenced election and the costs which are involved in changing the ballot.

3. All ballots for the election of June 3, 1986, previously described, have been printed. These include: sample ballots; absentee ballots; "machine strips"; and, ballots that are Spanish/English. The replacement costs for the afore-referenced ballots are $61,4900.00

4. If the Court should order on May 20, 1986 that the ballots for the County of Mercer be reprinted the earliest possible date for these ballots to be ready, on the normal work schedule would be June 2, 1986. If this were to happen the machines which

the "machine strips" (ballot inserts) are to be placed would no longer be in a centrally located location but rather would be over the entire congressional district, Mercer County, consisting of 252 districts.

5. As of May 13, 1986 this office has received 122 requests for absentee ballots. Of these requests 116 have been complied with, i.e., the absentee ballot has been sent to the person requesting it.

6. In determining the truth of the hereinabove assertions I have referenced all appropriate records and documents. More particularly, I am familiar with the process having been the Deputy County Clerk since 1981 and am familiar with the process having been the Deputy County Clerk since 1981 and am familiar with the election process. The above information comports with my general knowledge of the costs and practicalities of changing the ballot for

the entire congressional district, Mercer County.

TED M. YIM

Sworn and Subscribed to before me
this 15th day of May, 1986.

United States District Court
for the District of New Jersey

Civil Action No. 86-1856 (REC)

AFFIDAVIT

STEPHEN A. KOCZAK, et als.

Plaintiff

vs.

G. DALLAS DIXON, et als.

Defendant,

I, RANIERO M. TRAVISONO, of full age being duly sworn upon by oath depose and say:

1. I am the County Clerk of Middlesex County and charged with the responsibility of administering primary and general elections.

2. The status of the ballots for the June 3, 1986 Primary Election for the 4th. Congressional District is as follows:

a. The ballots for the entire 4th Congressional District within Middlesex

County consisting of Jamesburg, Monroe & Plainsboro have been printed.

b. The absentee ballots have been printed, punched and mailed to absentee voters.

c. The machine strips (ballots) have been proofread and are in the voting machines.

d. The sample ballots have been printed, proofread and are folded and ready for mailing.

3. To redo the entire 4th Congressional District, the following time frame would be necessary:

a. Absentee ballots - approximately two days.

b. Machine strips, printing and cutting - approximately two days.

c. Sample ballots, printing, proofread, folding - approximately two days.

d. Breaking down machines, removing

present strips, inserting new strips - unable to estimate time.

4. In my opinion, the work required only on the machines would require the warehouse ment to work overtime and delivery of the machines would be delayed.

5. It is also my opinion that the expense of redoing everything set forth above and the overtime for the Election Board, the warehouse people, the printer and my office would not only be prohibitive but would result in delays which would violate the time frames set forth in the statutes.

6. I make this Affidavit in response to the Plaintiff's Complaint and relief requested in the within captioned matter.

7. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

RANIERO M. TRAVISANO
CLERK OF MIDDLESEX COUNTY

Sworn and subscribed to before me
this 15 day of May, 1986.

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for State Defendants
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: DONNA KELLY-BOCCHER
Deputy Attorney General
(609) 292-1500

FOR THE DISTRICT OF NEW JERSEY
UNITED STATES DISTRICT COURT

CERTIFICATION IN OPPOSITION
TO PRELIMINARY INJUNCTION

STEPHEN A. KOCZAK, et al.,

Plaintiffs,.

v.

G. DALLAS DIXON, et al.,

Defendants.

CATHERINE COLAPRICO, being aware of the penalties for perjury, certifies to the Court, pursuant to 28 U.S.C. S1746, that the following statements are true and correct:

1. I am a member of the Middlesex County Board of Elections, which is responsible

for custody and preparation of voting machines.

2. For the June 3, 1986 primary election, we have allocated 531 voting machines, of which 34 are involved in the Fourth Congressional District.

3. We have received ballot inserts for the voting machines and they have already been installed. The machines are ready for inspection under N.J. S.A. 19:48-6, and that is scheduled to occur on may 19, 1986, from 10:00 to 11:00 a.m.

4. Following inspection and sealing, the machines will be shipped to the polling places beginning May 20, 1986. The process takes more than one week.

5. If the machines had to be reset before leaving their present position at our warehouse, the job would cost in excess of $5,000, considering overtime, and take more than four days. If it had to be done in

the field, the estimated cost would increase to about $7500 and the time would be five or six days.

CATHERINE COLAPRICO

DATED:

W. CAREY EDWARDS
Attorney General of New Jersey
Attorney for Stte Defendants
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: DONNA KELLY-BOCCHER
Deputy Attorney General
(609) 292-1500

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CERTIFICATION IN OPPOSITION
TO PRELIMINARY INJUNCTION

STEPHEN A. KOCZAK, et al.,

Plaintiffs,

v.

G. DALLAS DIXON, et al.,

Defendants.

JOAN KAPLAN, being aware of the penalties for perjury, certifies to the Court, pursuant to 28 U.S.C. S 1746, that the following statements are true and correct:

1. I am Supervisor for the Ocean County Board of Elections, whose functions include

responsibility for custody and preparation of voting machines.

2. For the June 3, 1986 election there will be 387 voting machines in use. Of these 19 will be utilized within the Fourth Congressional District.

3. Ballot inserts have been received from the Ocean County Clerk and are being installed this week and next.

4. A date for candidate inspection under N.J.S.A. 19:48-6 has not been established. However, the machines are due to be shipped to the polling places beginning May 27, 1986.

5. If it were necessary to reset the 19 machines, they would have to be returned to our warehouse, if removed, and the job would take one and one-half days of labor and cost approximately $1400.

JOAN KAPLAN

DATED:

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for State Defendants
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: DONNA KELLY-BOCCHER
Deputy Attorney General
(609) 292-1500

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CERTIFICATION IN OPPOSITION
TO PRELIMINARY INJUNCTION

STEPHEN A. KOCZAK, et al.,

Plaintiffs,

v.

G. DALLAS DIXON, et al.,

Defendants.

ANN D. FLYNN, being aware of the penalties of perjury, certifies to the Court, pursuant to 28 U.S.C. S1746, that the following statements are true and correct:

1. I am Superintendent of Elections for the County of Monmouth, State of New

Jersey. My office included responsibility for custody and preparation of voting machines.

2. For the June 3, 1986 primary election, I have allocated approximatley 395 voting machines. Of these, 110 are involved in the Fourth U.S. Congressional District. These machines have been prepared for use, except for the insertion of ballot strips, which have not yet been received from the Monmouth County Clerk.

3. I have been advised that the strips are at the printer's and are due any day. Once I get them, they will be installed as soon as possible (i.e., within one or two days of receipt).

4. Candidates have been scheduled to inspect the voting machines under N.J.S.A. 19:48-6 on May 28, 1986, at 2:00 p.m. Notices of the opportunity for inspection are due to be mailed out on or about May

19, 1986.

5. The machines will be transported to the polling places as soon as the above procedures have been completed.

6. If the machines had to be reset and they had not yet left the warehouse, it would take approximately five days and cost $2300. If the work had to be done in the field, the time and expense would be substantially greater, but I cannot pin down even estimated figures.

_____

_____

ANN D. FLYNN

DATED: May 16, 1986

UNITED STATES DISTRICT COURT
For the District of New Jersey

AFFIDAVIT BY JANE CLAYTON
MONMOUTH COUNTY CLERK

STEPHEN A. KOCZAK, et al

Plaintiffs

v.

G. DALLAS DIXON, et al

Defendants

STATE OF NEW JERSEY)
ss:
COUNTY OF MONMOUTH)

I, JANE G. CLAYTON, of full age, being duly sworn according to law, upon her oath, declares and says:

1. I am the County Clerk of the County of Monmouth

2. I understand that there has been a challenge filed regarding lay-out and printing of absentee and sample ballots in the upcoming primary election for the 4th

District. I have been informed that this challenge may result in the necessity of having new sample ballots, absentee ballots and machine inserts prepared for the June 3, election.

3. This would be an extreme hardship for the County of Monmouth, and it is highly unlikely that these new ballots could be prepared and ready in a timely fashion.

4. Absentee ballots have already been printed and mailed to all of those whose application has been received to date. Additonally, the sample ballots have already been printed and are scheduled to go to the mail order house by May 19, 1986. Furthermore, the machine inserts are being printed at the present time and deleivery should be made in batches within the next two to three days.

5. If we were required to reprint the sample ballots, absentee ballots and

machine inserts, the cost to the County would be as follows:

$15,565.75 for Sample Ballots

2,250.00 for Machine Inserts

2,147.00 for Absentee Ballots

As I indicated previously, I cannot guarantee that these ballots would be printed so as to be mailed in a timely manner. It would be extremely difficult to reprint these ballots on such short notice.

JANE G. CLAYTON

MICHAEL J. HOGAN
BURLINGTON COUNTY SOLICITOR
49 Rancocas Road
Mount Holly, New Jersey 08060
(609) 261-5001 File #08-45-86

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Robert E. Cowen, U.S.D.J.

File No. 86-1856 (REC)

AFFIDAVIT

STEPHEN A. KOCZAK, et al.

Plaintiffs,

v.

G. DALLAS DIXON, et al.
Defendants.

STATE OF NEW JERSEY)
ss:
COUNTY OF BURLINGTON)

EDWARD A. KELLY, JR., of full age, being duly sworn upon his oath deposes and says:

1. I have served as the Clerk of the County of Burlington for seventeen (17) years and in that capacity am responsible for the printing and mailing of ballots.

2. The Fourth Congressional District in Burlington County has approximately 31,000 registered voters, is comprised of eleven (11) municipalities divided into 60 Districts, each with at least one voting machine.

3. On April 17, 1986 absentee ballots, sample ballots and voting machine strips for the entire County were sent by the Burlington County Clerk's Office to its printer, Tapco.

4. Absentee ballots were received back from the printer on May 12, 1986 and addressed and mailed out by the County Clerk on the same day. Some 200 absentee ballots were sent. Subsequent requests for absentee ballots are mailed as they are received.

5. Sample ballots will be received by the County Clerk from the printer on May 15 and 16 and must be sent to InfoComp, the

County's mailing service, for preparation for mailing no later than May 19, 1986. InfoComp must mail sample ballots by May 27 and they require a minimum of one week to address the ballots.

6. Voting machine strips have already started to be delivered by the printer to the voting machine office and delivery continues on a daily basis.

7. Voting machines are delivered to the sites during week of May 26, 1986 and any chamges in the machine strips after that date would have to be done at each individual machine site resulting in increased costs to the County.

8. The cost to the County of printing absentee ballot and machine strips for entire County is approximately $9,000.00. The individual municipalities pay for the printing of the sample ballots and the municipalities may not have money budgeted

for a reprint of the sample ballots.

9. Cost of mailing sample and absentee ballots for the entire County is approximately $7,500.00.

10. The printer used by the County would be unable to reprint sample or absentee ballots or machine strips prior to the May 27, 1986 mailing deadline due to the vilume of the reprinting and the fact that the printer is also printing ballots for the Cape May County primary.

11. Consideration must also be given to the timing and costs of reprinting and mailing return sheets which must be sumbitted to Township Clerks and Judges of the District Boards the Thursday prior to the election, May 29, 1986.

12. At this time, the best estimate of costs involved in reprinting and remailing sample and absentee ballots and reprinting and replacing machine strips and return

sheets is at least $3,900.00.

Sworn and substribed to
before me this 15th day
of May, 1986.
Edward A. Kelly, Jr.

CAPTION

JOHN SACCA, being aware of the penalties for perjury, certifies to the Court, pursuant to 28 U.S.C. S1746, that the following statements are true and correct:

1. I am the Superintendant of Elections for the County of Burlington, State of New Jersey. My office includes responsibility for custody and preparation of voting machines.

2. My office has not yet received the ballot inserts for voting machines to be used in the primary election scheduled for June 3, 1986. I am informed by the Brulington County Clerk's Office, which is respinsible for preparation of the inserts, that they are presently being printed and will be forwarded to this office upon receipt.

3. The 60 voting machines to be used in municipalities in the Fourth Congressional

District in the primary election have been prepared, except for the insertion of the ballot strips.

4. The candidates' inspection session required by N.J.S.A. 19:48-6 has been scheduled for Friday, May 23, 1986, between 1:30 and 3:30 p.m.

5. Voting machines are to be transported to the various polling places on May 27-30 and June 2, 1986.

6. If the machines had to be reset to accommodate a change in the ballot, there are two possibilities as to timing and costs. If the machines had not been removed from the warehouse where they are presently situtated, the reset would take two to three days and cost about $2,000. If the job had to be done in the field, it would take three days of triple-shift work, and the cost (exclusive of overtime pay) would be $3,000.00 to $4,000.00.

7. The above estimates do not include the prospect of rescheduling the candidates' inspection session and are obviously keyed to the receipt of fresh ballot inserts from the County Clerk.

JOHN SACCA

DATED:

CAPTION

I, G. Dallas Dixon, upon my oath do depose and say:

1. I am the Defendant named herein and as such am the duly elected Chairman of the Mercer County Democratic Committee for the 1985-1986 term.

2. Attached hereto is a true copy of the Constitution and By-Laws of the Mercer County Democratic Committee.

3. Said Constitution and By-Laws do not establish, create, provide for, or address the creation of the Democratic Central

EXHIBIT "A"

Committee in Mercer County.

G. DALLAS DIXON

Sworn and subscribed to
before me this 14th day of
April, 1986.

CAPTION

1. I am the supervising election clerk, for M. Dean Haines, Ocean County Clerk, State of New Jersey, principal office located at Room 102, Ocean County Court House, Toms River, New Jersey, 08754.

2. I make this affidavit in response to plaintiffs application for a temporary restraining Order and Preliminary injunction in the above referenced matter.

3. As supervising Election Clerk, I am primarily responsible for assisting M. Dean haines in the discharge of his statutory duties as Clerk of Ocean County for the primary election to be held on June 3, 1986.

4. I have personal knowledge as to the preparation, printing, delivery of official sample ballots, absentee ballots and voting strips for Jackson Township, Ocean County, State of new Jersey, for the primary

election to be held on June 3, 1986.

5. On or about April 16, 1986, the Ocean County Clerk's Office received the Certification of Jane Burgio, Secretary of State, Department of State, State of New Jersey, including the certified list of candidates for the Office of House of Representatives and their respective slogans.

6. On or about April 18, 1986, the Ocean County Clerk's Office caused to be printed sample ballots, absentee ballots and voting strips for Jackson Township, County of ocean, for the primary election to be held on June 3, 1986. The printer employed by the Ocean County Clerk's Office is Ocean County Review, 715 Boulevard, Seaside Heights, New Jersey. Said election ballots and voting strips include the candidate's respective slogans as described in the Certification of Jane Burgio. To date,

there are about 11,502 registered voters in Jackson Township which necessitates the printing of approximately 12,000 to 13,000 election ballots.

7. On or about May 2, 1986, Ocean County review completed the printing of the Sample ballots, Official Ballots, Absentee Ballots and Voting Strips described above.

8. On or about May 6, 1986, the Ocean County Clerk's Office delivered for mailing Sample ballots for 255 districts of Ocean County, including Jackson Township to Mailing Services, Inc., 1319 North Broad Street, Hillside, New Jersey, 07205. Said sample ballots must be mailed no later than May 28, 1986, at noon.

9. On or about May 8, 1986, the Ocean County Clerk's Office began mailing absentee ballots for those registered voters requesting the same and are current with the requests for absentee ballot by

registered voters of Ocean County.

10. On or about May 8, 1986, voting strips were delivered to the Ocean County Election Board. It is my understanding that said strips have been installed in the voting machines stored at the Ocean County Board of Elections.

11. In the event this court were to direct the reprinting of the sample ballots, Official ballots, Election ballots and voting strips, a considerable number of uncertainties would exist.

12. First, only nine days remain within which to meet the May 28th mailing deadline. It is unknown whether this nine day reprinting goal could be realized. It is unknown whether the Ocean County Review, the election printer employed by Ocean County, could reprint approximately 12,000 to 13,000 new sample ballots in eight days. Unexpected events, such as equipment

failures, may cause even further delay. Additionally, the cost of reprinting all ballots and voting strips would be unknown at this time since it would depend in part on the number of overtime hours required for such printing.

13. Additionally, it si unknown whether mailing activities could be carried on to reach voters within time to provide voting information before the election. it is unknown whether Mailing Services, Inc., the election mailing service employed by Ocean County, could complete the mailing by the mailing deadline. Again, the additional cost would depend upon the number of overtime hours required for such mailing, an unknown factor at this time.

14. Furthermore, the voting machines would need to be opened, existing voting strips removed, the reprinted voting strips inserted, certified and sealed. Again,

whether this goal could be realized before the election is unknown at this time.

15. In the event that the relief requested by plaintiffs in this matter were granted against the County of Ocean, the reprinting, mailing and delivery of election ballots would cost the taxpayers of Ocean County large sums of money. Such relief would create chaos and havoc in order to meet deadlines for the June 3, 1986, election. It is doubtful that such reprinting and mailing of election ballots could be completed in time for the primary election to be held on June 3, 1986. Moreover, such a reprinting would create confusion among the registered voters in the Township of Jackson who have already received an Official Sample Ballot and would receive yet another Election Ballot.

TED HEITMAN

SWORN and SUBSCRIBED to

before me this 19th day

of May, 1986.

CAPTION

Dear Judge Cowen:

I am County Counsel for Middlesex County and am responding for Raniero Travisano, County Clerk in the above matter. The Middlesex County Clerk was served with the pleadins in the above matter on the morning of May 15, 1986. We do not intend to appear on the return date of the Order to Show Cause in this matter.

I have submitted an Affidavit of our County Clerk of Deputy Attorney General David Dembe detailing the problems which would result if the Plaintiffs' relief was granted. The County of Middlesex will rely upon this Affidavit as submitted by the Attorney General's Office.

If anything further is required, please advise.

Very truly yours,

JOHN J. HOAGLAND

cc: Mitchell Neider, Esq.
Leonard Fishman, Esq.
Mark Setaro, Esq.
Walter Bliss, Esq.
Donna J. Kelly-Boccher, Esq.
Michael J. Hogan, Esq.
Richard T. O'Connor, Esq.
Franklin Berry, Esq.
David Dembe, Deputy Attorney General
Raniero Travisano, Middlesex County Clerk

Honorable Robert E. Cowan
United States District Court
District of New Jersey
United States Court House
Trenton, NJ 08605

Re: Koczak, et al. v. G. Dallas Dixon, et al.
Civil Action No. 86-1856 (REC)

Dear Judge Cowan:

Kindly be advised that this office represents M. Dean Haines, Clerk of Ocean County.

Mr. Haines was served with numerous papers in this matter on Thursday, May 15, 1986.

Kindly accept this letter memorandum in lieu of a more formal brief on behalf of M. Dean Haines in opposition of Plaintiffs' motion to amend the Complaint to join M. Dean Haines, Clerk of Ocean County, in this matter.

Plaintiffs seek to restrain and enjoin the Secretary of State from placing or printing on the ballot for the June 3, 1986 primary election the slogan, "Regular Democratic

Organization," selected by Jeff Laurenti and certified by Jane Burgio, Secretary of State, pursuant to N.J.S.A. 19:23-21.

It is important to note that upon review of the Complaint, Plaintiffs' allegations do not appear to be directed at Dean Haines, Ocean County Clerk.

Rather, it appears that M. Dean Haines' only connection with this matter is that the County Clerk is statutorily authorized to cause the printing of official Primary Sample Ballots, Absentee Ballots and voting strips. N.J.S.A. 19:49-2. The County Clerk has not discretion with regard to the selection, approval or certification of any slogan or statement to be used in the primary election in connection with any candidate or group of candidates for office. N.J.S.A 19:23-25.1. The Secretary of State certifies the names of the persons endorsed in the Petition filed in his

office to the Clerks of the counties prior to the holding of a primary election, and thereby prescribes the slogan to be printed in connection with any candidate or groups of candidates for office in the primary Election. N.J.S.A. 19:23-21.

By Certification dated April 15, 1986, Jane Burgio, Secretary of State, certified the official list of candidates for the office of House of Representatives for the June 3, 1986 primary election, along with the designated slogan for each candidate. (See attached copy of Certification of Jane Burgio dated April 15, 1986)

In Ocean County, Jackson Township is the sole township in Ocean County included in the Fourth New Jersey Congressional District. On or about April 16, 1986, the Office of the County clerk received said Certification of Jan Burgio. On or about April 18, 1986, M. Dean Haines, County

Clerk for the County of Ocean, caused to be printed a sufficient number of official election Sample Ballots, Absentee Ballots and voting strips for the primary election of June 3, 1986. (See Affidavit of Ted Heitman, Supervising election clerk) The County Clerk in drawing the specifications for the printing of the official primary ballots included the names and slogans as described in the Certification of Jane Burgio, Secretary of State. To date, there are approximately 11,500 registered voters in Jackson Township, County of Ocean, which necessitates the printing of approximately 12,000 to 13,000 sample ballots.

As outlined in the Affidavit of Ted Heitman, on or about May 2, 1986, the printing of the official primary ballot for the June 3, 1986 election was completed. On or about May 6, 1986, the Ocean County Clerk delivered the sample ballot for the

255 districts of Ocean County, including Jackson Township, to Mailing Service, Inc., 1319 North Broad Street, Hillside, New Jersey, 07205, to be mailed to registered voters in the County of Ocean.

On or about May 8, 1986, the Ocean County Clerk's Office began mailing absentee ballots to registered voters of the County of Ocean requesting the same and the Ocean County Clerk's Office is current to date with such mailings.

On or about May 8, 1986, the Ocean County Clerk's Office delivered said voting strips for Jackson Township's primary election, June 3, 1986, to the Ocean County Board of Elections. Said voting strips have been installed in all voting machines located at the Ocean County Air Park warehouse. (See Affidavit of Ted Heitman) These voting machines have been checked, closed and sealed by the Ocean County Board of

Elections. (See Affidavit of Ted Heitman)

In the event Plaintiffs' request is granted against Ocean County, it is unlikely that the Ocean County Clerk's Office could substantially completed the statutory responsibilities with respect to the reprinting, mailing and delivery of official election ballots for Jackson Township. Only nine days remain within which to meet the May 28 mailing deadline. The election will be held in fifteen days. The reprinting of the same may not be ready by the mailing date and may not reach registered voters in jackson Township within time to provide voting information before the elections. It is unknown at this time whether Ocean County Review, the election printer employed by Ocean County, could complete the reprinting within the nine day deadline. Unexpected events, such as equipment failures, may cause further

delay. Additionally, it is unknown whether mailing activities could be achieved prior to the nine day deadline. the cost of reprinting and mailing all ballots for Jackson Township would depend in part upon the amount of overtime to print between 12,000 and 13,000 ballots, an unknown factor at this time and substantial expense to the taxpayers of Ocean County. Furthermore, it is unknown whether existing voting strips could be removed from the voting machines and new ones inserted, inspected and sealed in the voting machines well before the general election is held.

It is respectfully submitted that should Plaintiffs' requests be granted against Ocean County, such reprinting would create chaos.

Respectfully,

JOHN C. SAHRADNIK

BEST AVA

SAMPLE BALLOT, OCEAN COUNTY,
SHOWING SLOGANS

INSTRUCTIONS TO VOTERS

Move the RED handle of the curtain lever to the RIGHT as far as it will go and leave it there. (This closes the curtain and unlocks the machine for voting.)

Turn DOWN a pointer over the name of each candidate of your choice

Turn this pointer	to this position	and leave it DOWN
	NAME OF CANDIDATE	

After turning DOWN all the pointers you desire, LEAVE THEM DOWN and move the RED handle of the curtain lever to the LEFT as far as it will go and leave it there. (This records your vote, returns all pointers to their unvoted position, and opens the curtain.)

(Write-in voting machines) To vote for a person whose name DOES NOT appear on the ballot, push up the slide at the top of the machine (Personal Choice row) with the corresponding column number and WRITE or paste in the name of person for whom you desire to vote. NOTICE: When a slide is pushed up, the pointer in the corresponding column is LOCKED, unless in a group where you may vote for more than ONE. Once a voter has pushed up a slide, he CAN NOT change his mind on regular voting pointers.

Detailed Explanation: This is a PRIMARY ELECTION. Therefore you are confined legally to a choice of candidates for nomination within your own political party. This machine is so adjusted as to comply with the law, and will not permit you to vote in the primary of more than ONE party. Starting at the left end of the face of the machine, turn down the number of pointers as indicated in the TITLE OF OFFICE column. Do not be afraid of spoiling your ballot. The machine will not permit you to vote for more than the legal number of candidates.

Remember, no votes are tabulated until the RED handle is moved back to the left. Therefore if you desire to change your vote from one candidate to another, you may do so by merely turning up the pointer in question, and turning DOWN the pointer of your choice. Your final choice of pointers MUST be left in the DOWN position or the votes will NOT be recorded.

VOTERS ATTENTION

[illegible] IMPORTANT!

Official Primary Election Sample Ballot

[illegible]

BOARD FOR TEMPORARY CHANGE OF ADDRESS

COMMISSIONER OF REGISTRATION

COUNTY OF OCEAN

On [illegible]

[illegible]

CAST BY PRE SCRI

JUNE 3, 1986

Polls Open Between 7:00 A.M. and 8:00 P.M.

APP. 177

Jackson Twp. 8
580-00

YOUR POLLING PLACE

Jackson Twp. District No. 8
The Polling Place for this Election District is
Com. Jer. ITALIAN AMERICAN CLUB
Marshall St.

David T. Miller Sr.
Municipal Clerk

M. Dean Haines
M. DEAN HAINES
Clerk of Ocean County

Sample Voting Machine Ballot
Primary Election—June 3, 1986
COUNTY OF OCEAN
POLLS OPEN BETWEEN 7:00 A.M. and 8:00 P.M.

Personal Choice

OFFICE TITLE		MEMBER OF THE HOUSE OF Representatives	MEMBER OF THE BOARD OF CHOSEN FREEHOLDERS	TOWNSHIP COMMITTEE	COUNTY COMMITTEE	COUNTY COMMITTEE			
		FULL TERM Vote for One	FULL TERM Vote for Two	FULL TERM Vote for One	Vote for One	Vote for One			
REPUBLICAN Row A	A	SMITH	BUCKWALD	MURRAY	CARLSON	CARLSON	HYNES		
Row B	B								
Row C	C								
OFFICE TITLE		MEMBER OF THE HOUSE OF Representatives	MEMBER OF THE BOARD OF CHOSEN FREEHOLDERS	TOWNSHIP COMMITTEE	COUNTY COMMITTEE	COUNTY COMMITTEE			
		FULL TERM Vote for One	FULL TERM Vote for Two	FULL TERM Vote for One	Vote for One	Vote for One			
DEMOCRAT Row E	E	LARGERTY	LEAF	BEYER	CONWAY	TREWBLAY	BATES		
Row F	F	LACTAS							
Row G	G								

LABLE COPY

LETTER OF DEFENDANT LAURENTI
TO OCEAN COUNTY CLERK

April 5, 1986

M. Dean Haines

Ocean County Clerk, Room 102

CN 2191

Toms River, NJ 08754

Dear Mr. Haines:

I am a candidate for the Democratic nomination for Congress in the 4th Congressional District. This letter is to notify you that I would like to run on the same line as the Ocean County Democratic Party, using the slogan Official Regular Democratic Organization, with the approval of Ocean County Democratic Chairman Al Santoro. If you have any questions, please contact Mr. Santoro, or myself (at 609-392-0706).

Sincerely,

cc: Al Santoro

Ted Heitman, election clerk

State of New Jersey
Department of State

Trenton, New Jersey

I, JANE BURGIO, Secretary of State of the State of New Jersey, DO HEREBY CERTIFY that the persons named on the attached sheet(s) filed petitions in this Department of the office of Member of the House of Representatives, State of New Jersey, in pursuance with the provisions of an act entitled "An Act ot Regulate Elections," Title 19, Revised Statutes, and the amendments and supplements thereto, for whom the voters of the 3rd, 4th, and 13th Congressional District(s) may cast ballots at the Primary Election to be held on June 3, 1986.

IN TESTIMONY WHEREOF, I have here-

unto set my hand and affixed my

Official Seal at Trenton, this

Fifteenth of April, A.D. 1986.

CAPTION

THE COURT: All right. Here we are again. Have you all made your appearances for the record?

MR. NEIDER: Mitchell Neider of the firm Brener, Wallack & Hill, appearing as local counsel for the plaintiff, your Honor.

MR. ELGIN: Laurence A. Elgin of Washington, D.C., appearing pro hoc vice for the plaintiffs.

MS. KELLY-BOCCHER: Donna Kelly-Boccher for defendants Governor Kean, Attorney General Edwards and Secretary of State James Burgio.

MR. FISHMAN: Leonard Fishman of Cohen, Shapiro, Polisher, Shiekman and Cohen for the defendants Mercer County Democratic Committee and G. Dallas Dixon.

MR. KOENIG: Paul T. Koenig, Jr., Mercer County counsel on behalf of County Clerk, Albert E. Dryer and at the request of

Michael Hogan, Burlington County Solicitor, I am here representing the Burlington County Clerk, your Honor.

MR. SETARO: Mark Setaro of the firm of G. Dallas Dixon on behalf of defendant Jeff Laurenti.

THE COURT: This is plaintiff's application, as I understand. Is that correct?

MR. ELGIN: Yes, your Honor.

THE COURT: You may proceed.

MR. ELGIN: Knowing how conscientious your Honor is, I will not rehash what have filed in the Supreme Court in the form of a single justice application. I know it has also been filed here. I would point out, I think perhaps with the additional authorities we have cited, the best summary is the footnote from the 1944 case of Snowden Vs. Hughes, 321 U.S. 1, that is footnote No. 3 at page 12. That case

ironically, of course, involved elections of State officials and denied that such elections were covered at that time by the 14th and 1st Amendment, a position which was subsequently eroded during the 1960's in the voting rights cases in the South.

But nonetheless, in differentiating cases involving State officials, and elections to state office, the Court did summarize the situation for federal candidates in this note, and stated that such rights of candidates for federal office rested on the ground that the rights of suffrage in the federal elections are secured by the articles in the main body of the Constitution, that we argue here today, Article I, Section 2, and Article I, Section 4.

I would like to also emphasize a point that was interrupted by the questioning in our last hearing before your Honor, and

that is that the fundamental nature of this right, in that the framers, according to the testimony from James Madison that we cited, left a power in the Congress to override the power to regulate the times, places and manners of elections for federal office, as a safeguard against the dissolution of the Union.

And the point of this is that if the framers were reluctant to place this authority in the State legislators without this override and restraint, they of course obviously had no intention of placing it in the hands of political parties, their feelings about political parties are too well known to need reciting here, although they participated in them, they wanted them controlled.

Now, I see another point is made in the opposing brief of Mr. Fishman and I compliment Mr. Fishman on so quickly coming

up with a brief, and I want to address myself briefly to --

THE COURT: This is a brief filed in -- I have received no brief.

MR. NEIDER: I am sorry, your Honor. I believe there may be a misunderstanding. I was handed a copy of the brief that I believe Mr. Fishman filed in the Third Circuit, it was not filed --

MR. ELGIN: Oh, I am sorry. My apologies.

MR. FISHMAN: Your Honor, that was just filed less than an hour ago in response to the moving papers of the appellants.

THE COURT: That was filed in the Third Circuit, not in the district court.

MR. FISHMAN: No, it was not.

THE COURT: So it is not before me.

MR. ELGIN: My misunderstanding. I was handed the brief. I assumed it was before your Honor. Anyway, Mr. Fishman raises the point in that brief that your Honor raised

at the last hearing, and I want to address that because I think that is something that your Honor is going to consider here, and that is the question of whether we have a body operating here under color and authority of State law, whether this committee, a central committee, which has no statutory authorization, is itself, leaving aside the question of what the clerks and Secretary of State do in placing it on the ballot the slogan and so forth. And I believe the definitive case on that is Terry vs. Adams, we cited in 1953, 345 U.S. --

THE COURT: I am acquainted with that case.

MR. ELGIN: That is the Jaybird party case.

THE COURT: I know that.

MR. ELGIN: And I just want to briefly recite some points from that case. The

Court stated at page 464 in the Terry case, that when a State structures its electoral apparatus in a form which evolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitutional safeguards into play.

They cite Smith vs. Allwright, U.S. vs Classic and so forth. Then in that case, there is, in all three of the opinions that made up the majority, the one by Frankfurter and the one by four of the justices, and the opening one by Mr. Justice Black, there are statements about when you have this question of: is a statutory purpose being evaded: what is the substance that you look at? Of course, equity looks at substance rather than form.

I want to just briefly summarize what we

argue is the holding there. What matters is the purpose of the unsanctioned or authorized body. Whether it is operated to evade the statutory bar, and in that case, the phrase is used, "as part and parcel of the party organization," is it a means by which "certain selected members," to quote from the New Jersey case that we have cited here, "of the party" evade the statutory bar in question, here, the bar on preprimary endorsements.

What matters, Mr. Frankfurter, Mr. Justice Frankfurter said, is whether the device complained of is a device to defeat the statutory regulation. He raised the question: does the device used favor one class over another? Snowden v. Hughes makes the same point; favoring of one class over the other is invidious in political matters.

We of course argue that the practice

complained of here favors the class of insiders, those who are part of the inner committees and affiliated with the chairman, over the ordinary voters of the party. And indeed, it seems to be narrower than the attendees to the convention held by the central committee in question here because Mrs. Dubrovsky filed a complaint in the State Court as a member of that committee, but she complains of being left out of the process.

Now, another phrase used in this, in the Terry case, was whether the structure set up outside the statutory framework closely parallels that within the statutory framework so as to accomplish the same purpose. And I think that that is a situation here.

Now, I want to point, for example, to the responses we have gotten from the Ocean County Clerk's office, and the attorney for

that county. There is a letter in there by which the defendant Laurenti asked that he be placed on the ballot in Ocean County with the slogan complained of. I note the letter is on the fifth, three days after the endorsing convention of the Central Committee, on the second of May, and that at that time he had not even filed to be a candidate with the State. So clearly, the informal apparatus here is, as was the case in Terry, is superseding and subverting the official way of doing things.

Now, another thing I not in that letter was that he states that he has approval of the chairman of the party in that county, Ocean County. He doesn't say he has the approval of the candidates with whom he is to be bracketed. He says he has the chairman's approval. And I think that, when we get into discovery in this case, it will show that there has been a widespread

subversion of the statutory scheme.

What we see in the documents of the Ocean County is true of all the counties, and by a gradual process the statutory purpose has been circumvented. And that brings me to my final point on that, on this board point of the question of the Central Committee versus the official committee, in that, as stated in the Terry case at page 476, the individual parts of the scheme to circumvent the statute, if considered alone, may some of them be perfectly legitimate, but what matters is the overall plan that is being carried out, and the substance of that plan.

Now, having said that, I return in closing to the, to what I understood to be your Honor's basis for dismissing the case, the question of federal jurisdiction or lack there of, and I briefly want to re-emphasize --

THE COURT: Your application before the

Court is not an application to -- is an application for a stay, is it not?

MR. ELGIN: That's right, for a stay of, and I understood your Honor's dismissal to be based on a holding of lack of jurisdiction, regardless of the merits of our case.

THE COURT: That's correct. As a matter of fact, I endorsed on the record that I made absolutely no finding as to the merits or lack thereof of your case, but that the case belongs, in any event, in the State Court. But I further endorsed on the record that even if I were a State Court judge, I would have grave doubts whether I would entertain an application which was on, I called it the eleventh hour. At this point it is the eleventh hour and the 59th minute of the day.

MR. ELGIN: Does your Honor wish me to answer that question?

THE COURT: By reason of laches because I read your moving papers and it was my firm feeling, if not my finding, that this is something which you knew about many, many moons ago, and that you slept on your rights, if you have any rights. So I want the record to be clear that I, although I felt I had not jurisdiction, I felt also that even if this Court did have jurisdiction, or if I were a State Court judge, that the laches on it are a law school textbook example.

MR. ELGIN: May I briefly address that point, your Honor?

THE COURT: Please do. Make the record clear.

MR. ELGIN: First of all, I would like to clarify, I was somewhat puzzled when I heard your Honor say last time in response to Mr. Fishman's argument that we had alleged that the client, that our clients,

the plaintiffs had known of this practice for many years. I looked at the complaint and the allegation I find is one that the practice was going on. Perhaps I am wrong, but I didn't recall, in this, I can't find any allegation that our clients knew of the practice during that time.

THE COURT: You certainly allege this is something of longstanding. I don't know whether I got it from the complaint, the affidavit. I might have even gotten from the brief. But it was, I read it. I didn't, I am not hallucinating. I read it in your moving papers, because I read it before I received anything in response from the defendants.

MR. ELGIN: Your Honor --

THE COURT: And it piqued my interest, because I know I think maybe the day before I received at my own house, the announcements of the primary or, it was a

couple of days later, whatever it was, the mailing, and I said my God, how am I going to get involved in something like this when, you know, the horse race is already under way?

MR. ELGIN: I understand, your Honor. I just want to emphasize that I do not believe that we have acknowledged a knowledge on the part of the plaintiff as opposed to be practices having existed.

THE COURT: Well, let's put it this way. Your client is a grown man of wide human knowledge and certain experience in political life. You have to acknowledge that.

MR. ELGIN: Oh, we do, you Honor.

THE COURT: All right. I want to tell you, it would be hard for me to understand that anyone who has that scope and depth in the political arena could not be aware of what he is claiming to be this obvious

violation.

MR. ELGIN: I would like to respond to that in this way. I would like again to refer to the Terry case, and compare this situation to that in which the Supreme Court says in that case that the practice was carried on largely by word of mouth and by the communication within the community. Now, our allegation is that our clients were not part of this, the inner group that carried on this process.

THE COURT: Oh, I understand that, that your client was an outsider and that inner group was steering it, but whether he is an outsider or an insider, everyone knew how the system worked, whether it was working legally or illegally. Everyone knew how this system was working.

MR. ELGIN: I understand, your Honor.

THE COURT: Why don't you relax?

MR. ELGIN: I would like to make two

points in response to that. One is that the endorsement practice on the ballots in only part of what we allege is wrong here, is going on here that violates the Constitution and the statutory scheme, and so we, even if we were not to obtain that relief, we would still want to press for declaratory judgement, the correction of the practices and so forth.

This is a case, as the Supreme Court says, "capable of repetition yet evading review." Our clients made it very clear that they want to pursue the judgement, regardless of whether that portion of the relief is --

THE COURT: I understand, and in response to your desire to have ad interim or injunctive relief, it was my feeling that I had no jurisdiction and I said that, you know, the State Court, I think, is your proper forum.

MR. ELGIN: Right. And the second point I

would like to make in response to that is that, it that, it is of the essence of our complaint that the deception that was involved here was the carrying out of the forbidden -- the purpose forbidden by the statute through the committee which was very little known, the central committee, and whose existence and overlapping functions were not bruited abroad, were not advertised to the voting community.

And that, therefore, the ordinary voter was confused by this scheme and our clients were of that class, and they did not fully understand what was going on, and we do not think that in the exercise of reasonable diligence, short of the kind of proceeding that they are now involved in, they could have found that out. Had it not been for the filing of the State Court proceeding by Mrs. Dubrovsky they would not have begun to comprehend this full plan or proceeding, a

proceeding, in our allegation, to circumvent the statute. That is all I have to say at this time.

THE COURT: For purpose of this record, your immediate application to this Court is for what, what kind of order are you seeking?

MR. ELGIN: We, of course, we asked the higher courts for a stay. As is customary, they asked we first seek a rehearing here to see if there would not be a stay at this time. At this time, we would like to really add that we would like, and I realize in view of the way your Honor is going, this probably is not likely to be granted at this level, but we want to put on the record we would like to request, if necessary, that the election itself be stayed in order to correct these situations.

THE COURT: Well, okay, that is something

that quite frankly just came out of the blue. There is nothing filed with me. I really don't like surprises. I wish you would have at least given me some telephone notice that you were going to seek that. Have you advised you adversaries you were going to seek a stay of the election orally?

MS. KELLY-BOCCHER: No, we got no such notice of that.

THE COURT: I will not even entertain that request then, I am sorry, I will not even entertain it. I quite frankly, I like to study things, and whether I do it right or wrong, I like to make my decision after I study it.

MR. ELGIN: Surely. Surely.

THE COURT: And I can't even, quite frankly, entertain that request. It is not that I would not entertain it, out I feel as if it is only proper that you have given your adversaries and the Court some notice.

MR. ELGIN: Surely, your Honor.

THE COURT: For purposes of the record today, you are seeking from me what?

MR. ELGIN: We are seeking from you a reconsideration of your Honor's decision dismissing the cause upon the motion of Mr. Fishman's clients for the, on the threshold

question of lack of federal jurisdiction.

THE COURT: And if I do not -- in other words, you are seeking rearguement on my original decision.

MR. ELGIN: That's correct.

THE COURT: All right. And if I -- you want me to reverse myself based upon the filing which I have received, which was captioned "Notice of Motion on Short Notice for a Stay of the Judgment of the District Court"?

MR. ELGIN: Yes, that's correct.

THE COURT: All right. And this incorporated what appears to me to be an application which was made to Justice Brennan?

MR. ELGIN: That's correct. The basic brief is contained in that document.

THE COURT: The were not originally cited. I have read them and I have had an opportunity to go over them. So, basically

what you are seeking is a reconsideration by myself of my earlier decision.

MR. ELGIN: That's correct.

THE COURT: All right. I understand your position. Would you like to respond?

MS. KELLY-BOCCHER: Just very briefly, your Honor. Basically, the State would rely on its previous submissions. I would comment what has been submitted to Justice Brennan adds nothing to justify any type of federal jurisdiction in this case. There is absolutely none. As for seeking a stay of the election, or a reprinting of the ballots --

THE COURT: You don't have to address that because I said I would not entertain it.

MS. KELLY-BOCCHER: But they are asking for the reprinting of the ballots. That is quite clear, from my reading of their application for a stay. But as the Court knows from its, from the certifications and

affidavits that were submitted previously, that the reasons are even more compelling now to simply disregard that request.

At this point, four days before the primary election to be held statewide, it is an absolutely irresponsible request and contrary to the assertions that have been made by the plaintiffs. Their interests is not in protecting the voters of the 4th District in that they have no hesitation to ask this Court to jeopardize the very right of those voters to cast their ballots on June 3rd.

I would also like to point out that contrary to Mr. Elgin's comments, I think the Court is absolutely correct in its reading of the papers that were filed by the plaintiffs, that the plaintiffs have acknowledged knowledge of the previous conduct, alleged conduct, of the Mercer County Democratic Committee.

THE COURT: Where was that? I read it somewhere.

MS. KELLY-BOCCHER: I read it on my interpretation of the complaint is that on page 5, paragraph 15, they allege upon information and belief that the Mercer County Democratic Central Committee was created some years ago for the avowed purpose of endorsing and screening party candidates. I am paraphrasing. This was a verified complaint that was submitted and along with
it was an affidavit signed by Mr. Koczak in which paragraph 2 he states, "I have personal knowledge of the facts set forth herein, and if called as a witness, I could testify competently thereto."

I don't think that question of laches needs to be addressed beyond that. But basically, I think that the Court's initial decision to dismiss the complaint for lack

of jurisdiction was eminently reasonable, and beyond that, it was the only course of action the Court could take in this matter. I think the Court should summarily dismiss any request for reconsideration, and certainly not grant any stay. Thank you, your Honor.

MR. FISHMAN: Your Honor, I would just join in what Miss Kelly-Boccher has said with regard to the complaint. We too understand that there was knowledge some time ago, even if we accept that the knowledge was as recent as April 3rd, that is no excuse for waiting to mid-May to come to this Court.

And at the very end of May, where we are right now, to ask for this emergent relief. I think it is clear from the complaint that knowledge of this practice was fairly widespread and should have reached the attention of Mr. Koczak.

On the question of subject matter jurisdiction, the cases that have been cited in the original brief in this, in this more recent brief, go to the issues that I discussed at the last hearing. Namely, deprivation of some fundamental federal right. For example, denying blacks the right to vote, redistricting of black sections of town out of a municipality so as to remove them from municipal elections where clearly the Court has recognized that a federal statute or provision of the federal Constitution has been violated.

I think we have here a very different case, and for the reasons that your Honor decided last time, there was no subject matter jurisdiction, I think the same conclusion ought to be reached again.

I would just add, because there has been so much comment by Mr. Elgin concerning suspect classes, insiders, outsiders, et

cetera. There is nothing in the Constitution that says that Democrats or Republicans or Independents should not be active in politics. There will always be in politics some insiders and there will always be some outsiders. That is not a suspect classification. What usually divides the two is that one group is more actively involved in elections, and that switches from one election to another.

It is well known, for example, in a presidential year many people who might not be active in politics otherwise begin to work on presidential campaigns because they are stimulated to do so by the gravity of the issues and so on. No federal statute, and certainly not the Constitution, certainly not the framers who were themselves political insiders who met to frame our Constitution, would have opposed the practice of people meeting and talking

to discuss political issues.

What the New Jersey statute says is that certain political committees that it creates, and only those political committees, are prohibited from endorsing candidates. Those political committees are municipal, county and State political committees. The plaintiffs would have this Court decide that any political group that comes together for the purpose of discussing politics may not endorse candidates. That is not the case.

If a political group is not the one that the statute prohibits from endorsing candidates, it may do so, and of course those political groups have themselves First Amendment rights to meet and discuss issues. In fact, that is an important part of the political fabric of our society.

So I think that that -- we have plaintiffs here characterizing any political activity

to review and endorse candidates, for example, the League of Women Voters may endorse candidates in a primary or general election. Anybody that is not prohibited from doing so by the statute may endorse candidates, and as the Court said in Gillen vs. Shiel, the Court should be very careful before stopping committees that are not explicitly prohibited from endorsing candidates from doing so in furtherance of their First Amendment rights.

That is all I will say on the matter of subject matter jurisdiction.

I think on the question of laches, it is clear now more than ever that the election being four days away, this would be disruptive, particularly in light of the fact that there is no probability of success on the merits. I am going back now to the original application for a preliminary injunction.

A third point, in all of the conversation or argument that I have heard from plaintiffs, I have not heard the plaintiffs make the case that there is a connection between the alleged violation which is an endorsement by a prohibited committee that is prohibited from endorsing and the relief they are asking for.

Candidate Laurenti took the slogan, "Regular Democratic Organization." He could have taken "Regular Organization Democrat," he could have taken any slogan he desired so long as it was not owned by someone else and so long as it was six words or less. He could not have taken "Traditional Democratic Organization." I think that is the one that candidate Koczak has selected.

But candidate Laurenti did not need anybody's permission to take that slogan. That was a choice he made himself and that

is clearly given to him under out statute. That is not related to the question whether there was an improper endorsement, and I think plaintiffs have never made out that case to show a connection between the alleged violation, even if it had occurred, and the relief that they are asking for. They have no authority to deprive candidate Laurenti of a slogan he chose to describe himself.

I am not sure what the plaintiffs want candidate Laurenti to put in its place since he is clearly entitled to use a slogan under election law.

Finally, one point I would make regarding the papers filed by plaintiffs. With due respect to counsel for the plaintiffs, I think Mr. Elgin should be reminded that someone admitted pro hac vice in New Jersey is subject to our rules of professional conduct, and it is my humble opinion that his characterization of Judge Levy's decision in a related matter attributing the decision to his allegiance or ties to the regular Democratic party organization really are not a direct violation of rules of conduct, and point two, certainly does no credit to his client's cause, nor to Judge Levy or to the Bench.

Thank you, your Honor.

MR. KOENIG: Judge, I may not be as

sophisticated in election law as some of the other attorneys who are here arguing today, but I do know a little bit about applying for stays, and my understanding was that you have to do two things when you apply for a stay and one is to show a substantial likelihood of success on the appeal above. And I didn't hear counsel really indicate today that he had any enhanced likelihood of success on the appeal that he has filed with respect to his claim of irreparable injury, I am not even going to talk about that.

His client is a candidate for public office. He is standing for election next week and he is on the ballot and the voters are going to speak to his candidacy at that time. But I have not heard him raise one issue today, or add one bit of information, or evidence, whatever you would consider, that would indicate that he has any

likelihood of success on his claim above, and he is requesting you today to stay your judgement, and not to entertain this matter, that there is no federal jurisdiction.

It is the --

THE COURT: I think he is asking me to reverse my earlier decision.

MR. KOENIG: I think he is, too, Judge, but he has captioned it a motion for a stay, in essence, you would have to reverse, a trial judge who is granting a stay of his own decision would have to reverse himself or say I am not certain about by decision. And I have not heard him say anything here today in his argument or introduce anything through the papers that indicate that he has, that he is confident that he has that substantial likelihood of success.

I am here for the County. I am the county

attorney. Miss Kelly-Boccher is here as a Deputy Attorney General. I know she has expanded a lot of legal resources at the State level on this case. We are funded, our offices are funded by the taxpayers of Mercer County and the State of New Jersey, and it is an expensive proposition to continually return in a case like this. And there is a cost that has to be borne, and has to be addressed with the consumption of the courtroom time, the judge's time and so forth, and there is no likelihood of success in this matter. What I believe here is that this matter is back in court again because the primary is just over the horizon and there is a possibility that it enhances the candidacy of the candidate to be in court again, whether he wins or loses. And I have other things to be attending to this afternoon that are of great importance.

THE COURT: How does it enhance his candidacy?

MR. KONIG: He gets a newspaper article.

THE COURT: I am not aware that this was reported in the press.

MR. KOENIG: I did read it in the newspapers, your Honor. I am sorry. I probable reread some, it wasn't in the New York Times or the Newark Star Ledger. It was probably in the Lawrence Ledger or the Trentonian or something of that nature.

THE COURT: I read those papers, too.

MR. KOENIG: Well, at any rate, I did read an article about it, your Honor. He has had his day in court before you and I think you dealt with him fairly and I really, I wish that the matter had been laid to rest at that time, on behalf of myself and Burlington County Solicitor Hogan.

MR. SETARO: Your Honor, I just would like to make one comment on the papers that were

submitted by plaintiff, that is the papers submitted to Justice Brennan. Again, going back to these comments about Judge Levy's decision. I was the attorney for the defendant at that time, and was a part of that decision, and he makes the allegation that Judge Levy felt that because it was only a 55 percent overlap in the two committees, that that was not enough, that it would take almost 100 percent overlap.

My recollection of Judge Levy's decision was that if it was possibly a 90 or 95 percent overlap, that may, that may change his mind, but he was looking for more than just an overlap. He wanted some more evidence, and I don't see any more evidence handed in this case than was submitted before Judge Levy at that time and Judge Levy at that time felt that there was little merit to their case.

And, therefore, I feel that your Honor

should feel the same way, that there also is no merit in this case due to the fact there is no evidence before you that there is such an alter ego relationship between the two committees.

THE COURT: I really didn't read the merits of it in the first place. I just want the record to be very clear and I appreciate your argument. I am not agreeing or disagreeing with what you said. I just never considered it in that way, quite frankly. I never considered the merits.

All right. Gentlemen and lady, having had the benefit of the recent filing captioned "Notice of Motion on Short Notice for a Stay of the Justice of the District Court," and having had the benefit of argument this afternoon, I am of the opinion that my original decision should not be vacated, altered or amended in any way whatsoever.

As a matter of fact, having had additional time to study it, I was rather rushed last time, I am more confident now than I even was on the first go 'round that my original decision was legally proper, that is to say, that this Court has no jurisdiction to hear and determine this matter.

I think I made an oral decision from the bench at the original time. I did, didn't I?

MS. KELLY-BOCCHER: Yes, your Honor.

THE COURT: Is there any reason why I just should not say for purposes of this application, and for purposes of review, that I repeat the decision which I orally read into the record at that time, and for the same reasons, decline to reverse myself or to in any way alter the original order which I have entered? Is there any reason why I should not handle it that way?

MR. KOENIG: Your Honor, I think in

addition to that, that is proper, but I do think you should indicate that you denied the stay requested by counsel.

THE COURT: Is there any reason why I shouldn't also deny your application for a stay?

MR. NEIDER: Your Honor, if I may just speak as to an administrative matter. Shortly before I appeared this afternoon before your Honor, I was contacted by the Court of Appeals for the Third Circuit requesting for purposes, specifically for purposes of review of plaintiff's application that the, that this Court furnish a written statement dismissing -- as to identifying the reasons as to both the dismissal originally and as to the dismissal of our present application. And I indicated that to your clerk informally and I would just respectfully request that that be accomplished so that the review

could be probably effectuated, your Honor.

THE COURT: All right. Then why don't I do it this way? I have my notes here. Why don't I just read into the record at this time my reasons for my dismissal and failure to grant your application for a stay, and direct you to forth with have the reporter transcribe this and it will serve as my written statement.

MR. NEIDER: Your Honor, we would have obviously no objection to making such a request of the reporter. It is my understanding in terms of the shortness of time, if that can be effectuated, I was asked to forward such a statement this afternoon. I indicated that it was not something within my control. I did not know whether your Honor would be so disposed.

THE COURT: I am going to accommodate you as best I can. My only problem is it is

four o'clock now. I have two cases waiting for me in chambers. I have got a secretary who is loaded up and leaves, incidentally, on Friday at 4:30. The best I can do and I want to accommodate you is to dictate as best I can, and it is not going to be anything of Law Review quality, to the reporter. I will direct that you order the transcript and that will serve as my written statement for purposes of review.

MR. NEIDER: Thank you, your Honor.

(Off the record discussion.)

MR. ELGIN: Your Honor, I was wondering if there was and administrative problem. One way to handle it might be just to issue just a short statement with some reasons to follow or something.

THE COURT: That is what I am going to do. If I have a little bit more time, I would make it more expensive, I would cite some things and put a blue ribbon around it, but

life is short and I have more than I can handle as is.

All right.

(Pause.)

(Opinion of the court previously transcribed under separate cover.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Docket No. 86-1856 REC

NOTICE OF APPEAL.

STEPHEN A. KOCZAK, 261 Ashmore Avenue Trenton, Mercer County, New Jersey, individually and as he is a voter in Mercer County and a qualified candidate for the nomination of the Democratic Party for office of the U.S. House of Representatives from the fourth congressional district, and as a representative of all registered Democrats in Mercer County and the fourth congressional district who are eligible to run for the office of party nominee for the national legislature, KATHERINE E. ROTTER, 911 Hudson Street, Trenton, Mercer County, New Jersey, and JOHN G. RESCH, 1845 South Clinton Avenue, Trenton, Mercer County, New

Jersey, individually and as registered voters and members of the Mercer County Democratic Party.

Plaintiffs,

v.

G. DALLAS DIXON, 222 South Broad Street, Trenton, Mercer County, New Jersey, individually and as Chairman of the MERCER COUNTY DEMOCRATIC COMMITTEE, Chairman of the Mercer County Democratic Central Committee and leader of the Mercer County Democratic "organization"; "THE MERCER COUNTY DEMOCRATIC COMMITTEE 901 South Broad Street, Trenton, Mercer County, New Jersey, the MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE, 222 South Broad Street Trenton, New Jersey, JEFFREY LAURENTI, 464 Hamilton Avenue, Trenton, Mercer County, New

Jersey, individually and a Democratic candidate for the fourth congressional district; HOWARD KAYE, 102 Graf Avenue, Lawrenceville, Mercer County, New Jersey, individually and representative of those who serve on both defendant committees; GERALD STOCKMAN, 176 West State Street, Trenton, Mercer County, New Jersey, individually and as a public officeholder; LOUISE LOMMA, 1501 Parkside Avenue; Ewing, Mercer County, New Jersey; JANE BURGIO, 405 West State Street, Trenton, Mercer County, New Jersey, individually and as Attorney General of the State of New Jersey; THOMAS H. KEAN, State Capitol, Trenton, Mercer County, New Jersey individually and as Governor of the State of New Jersey.

Defendants.

Notice is hereby given that STEPHEN A. KOCZAK, KATHERINE E. ROTTER and JOHN E. RESCH, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Third Circuit from the final judgement dismissing the cause for alleged want of a federal question entered in this matter on the 21st day of May 1986.

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CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES: APP 38

Constitutional Provisions

Art.I, Sec.2, Cl.1:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature."

Art.I, Sec.4, Cl.1:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Art.VI, Cl.2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Art.VI, Cl.3:

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;"

First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacably to assemble, and to petition the government for a redress of grievances."

Fourteenth Amendment, Sec.1:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fourteenth Amendment, Sec.2:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the

whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

Statutes of the United States:

28 U.S.C. 1254 (2):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

...

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal Questions presented."

28 U.S.C. 1331:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

28 U.S.C. 1343:

"(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from a person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution

of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of congress providing for the protection of civil rights, including the right to vote."

28 U.S.C. 1652 (The Rules of Decision Statute):

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

28 U.S.C. 2201:

"In a case of actual controversy within its jurisdiction,...,any court of

the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. 2202:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

42 U.S.C. 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 U.S.C. 1985:

"...

(3)If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal

privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such Stte or Territory the equal protection of the laws;...; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in futherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned hy such injury or deprivation, against any one or more of the conspirators."

42 U.S.C. 1986

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined by as defendants in the action...."

42 U.S.C. 1988:

"The jurisdiction in civil...matters conferred on the district courts by the provision of this Title, and of Title

"CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause,... In any action or proceeding to enforce a provision of sections 1977, 1978, 1979,

1980, and 1981 of the Revised Statutes [42 U.S.C. Secs. 1981-1983, 1985, 1986],... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

New Jersey Statutes:

N.J.S.A. 19:1-1:

"...

"'Primary election' means the procedure whereby the members of a political party in this Stte or any political subdivision thereof nominate candidtes to be voted for at general elections, or elect persons to fill party offices, or delegates and alternates to national conventions.

...

"'Political party' means a party which, at the election held for all of the members of the General Assembly next

preceding the holding of any primary election held pursuant to this Title, polled for members of the General Assembly at least ten per centum (10%) of the total vote cast in this State.

"'Party office' means the office of delegate or alternate to the national convention of a political party or member of the State, county or municipal committees of a political party."

N.J.S.A. 19:5-1:

"A political party may nominate candidates for public office at primary elections provided for in this Title, elect committees for the party within the State, county or municipality, as the case may be, and in every other respect may exercise the rights and shall be subject to the restrictions herein provided for political parties;..."

"As amended L.1948,c.438,p.1696,Sec.4."

"Historical Note

"Source. L.1930,c.187, Sec.44,p.689."

N.J.S.A. 19:5-3:

"The members of the county committees of political parties shall be elected annually at he primary of the general election in the manner provided in this Title for the selection of party candidates to be voted for at the general election by voters of a municipality. The county committee shall consist of one male and one felmale member from each unit of representation in the county. The male receiving the highest number of votes among the male candidates and the female receiving the highest number of votes among the female candidates shall be declared elected. Members of the county committee shall actually reside in the districts or units which they respectively represent. The county committee shall

determine by its bylaws the units into which the county shall be divided for purpose of representation in the county committee.

"The members of the county committee of each of the political parties shall take office on the first Saturday following their election, on which day the terms of all members of such committees theretofore elected shall terminate. The annual meeting of each county committee shall be held on the first Tuesday following the primary election, except that when such meeting day falls on a legal holiday then the said meeting shall be held on the day following, and when such meeting day falls on the day of a municipal runoff election within the county then said meeting may be held on the day following, at an hour and place to be designated in a notice in writing to be mailed by the chairman of the outgoing

county committee to each member-elect, at which annual meeting the members of such committee shall elect some suitable person as chairman who shall be a resident os such county to hold office for 1 year, or until his successor is elected. The members shall also elect a vice-chairman of the opposite sex of the chairman to hold office for 1 year or until his or her successor is elected and the vice-chairman shall perform all duties required of him or her by law and the constitution and bylaws of such committee. Such committee shall have power to adopt a constitution and bylaws for its proper government. The chairman shall preside at all meeetings of the committee and shall perform all duties required of him by law and the constitution and bylaws of such committee.

"When a member of a county committee ceases to be a resident of the district or unit from which elected, a vacancy on the

the county committee shall exist. A member of a county committee of any political party may resign his office to the committee of which he is a member, and upon acceptance thereof by the committee a vacancy shall exist. A vacancy in the office of a member of the county committee of any political party, caused by death, resignation, failure to elect or otherwise, shall be filled for the unexpired term by the municipal commmittee of the municipality wherein the vacancy occurs, if there is such committee, and if not, by the remaining members of the county committee of such political party representing the territory in the county in which such vacancy occurs.

"The chairman of the county committee of the several political parties shall before April 1, certify to the clerk of each municipality in the county the unit of representation in such municipality,

together with the enumeration of the election district or districts embraced within such unit."

"Amended by L.1964,c.23,Sec.1; L.1965,c.4, Sec.3; L.1966,c.19,Sec.2; L.1967,c. 7, Sec.2;L.1967,c.27,Sec.2,eff.April 21, 1967; L.1968,c.292,Sec.2,eff.Sept.6,1968; L.1978,c.29,Sec.1,eff.June 7,1978; L.1979, c.458,Sec.2,eff.Feb.27,1980; L.1980,c.105,Sec.3,eff.Sept.11,1980."

N.J.S.A. 19:5-3.1

"In the time intervening between a primary election at which the members of a county committee of a political party are elected and the annual meeting of the county committee as provided by R.S. 19:5-3, any person elected to membership on that county committee at that election may request, in writing and by certified mail, either access to the complete financial records of the county committee or a copy

of the balance sheet of the county committee showing the assets and liabilities of the county committee as of the close of business on the date of that primary election. The person requesting that access or copy of the balance sheet shall receive the access or copy so requested within 48 hours of the receipt of that request by the committee. L.1983,c.579, Sec.23,eff. Jan. 17, 1984."

N.J.S.A. 19:5-5:

"Any state committee, county committee or municipal committee of any political party may receive and disburse money for the general purpose of maintaining such organiaation during the whole or any part of the year. The expenses for maintenance of organization shall be confined to the hiring of suitable rooms for meetings of such committee, for stationery, for hiring of necessary clerks, for the expenses of

of necessary clerks, for the expenses of notices of the meetings of such committee, for giving publicity to the policies and candidates of their respective party organizations, and other expenses incidental to the maintenance of such organization.

"Within twenty days after the day of the general election, the person who has had the custody of the moneys contributed to or on account of any state, county, or municipal committee during the previous year shall file with the secretary of state in the case of the state committee, and with the county clerk in the case of the county or municipal committee, a statement of the amount of money received by or on behalf of such committee during the previous year, together with the names and addresses of the persons from whom the money was received, and also a statement of the purposes for which it was expended,

itemized as to all items in excess of five dollars, and with a general statement as to the purposes for which the items less than five dollars were expended. The person making such statement shall make affidavit that the same is true."

N.J.S.A. 19:23-5:

"Candidates to be voted for at the primary election for the general election shall be nominated exclusively by the members of the same political party by petition in the manner herein provided.

"Historical Note

"Source. L.1930,c.187, Par.270,p.792."

N.J.S.A. 19:23--17:

"Any person indorsed as a candidate for nomination for any public office or party position whose name is to be voted for on the primary ticket of any political party, may, by indorsement on the petition

of nomination in which he is indorsed, request that there be printed opposite his name on the primary ticket a designation, in not more than six words, as named by him in such petition, for the purpose of indicating either any offical act or policy to which he is pledged or committed, or to distinguish him as belonging to a particular faction or wing of his political party; provided, however, that no such designation or slogan shall include or refer to the name of any person or any incorporated association of this State unless the written consent of such person or incorporated association of this State has been filed with the petition of nomination of such candidate or group of candidates. As amended L.1944, c.231, p.787,Sec.1."

"Historical Note

"Source. L.1930,C.187, Par.282,p.798"

N.J.S.A. 19:34-33:

"No state, county or municipal committee or organization of any political party shall expend any money in aid of the candidacy of any candidate for election as a delegate at any national convention, or election to any party position, or for nomination as a candidate of a political party for public office."

"Historical Note"

Source. L.1930,c.187, Par. 465,p.895"

N.J.S.A. 19:34-52:

"No state, county or municipal committee of any political party shall prior to any primary election indorse the candidacy of any candidate for a party nomination or position."

"Historical Note"

"Source. L.1930, c.187, Par. 484, p.906"

MOTION FILED
JAN 29 1987

No. 86-1079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STEPHEN A. KOCZAK, KATHERINE E. ROTTER, and JOHN G. RESCH

Appellants,

v.

G. DALLAS DIXON, THE MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE, JEFFREY LAURENTI, HOWARD KAYE, GERALD STOCKMAN, LOUISE LOMMA, JANE BURGIO, W. CARY EDWARDS, THOMAS H. KEAN,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE NATIONAL LEGAL FOUNDATION AMICUS CURIAE, IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

ROBERT K. SKOLROOD PAUL S. McCONNELL

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IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1986
No. 86-1079

Stephen A. Koczak,
Katherine E. Rotter, and
John G. Resch,

Appellants

v

G. Dallas Dixon, The Mercer
County Democratic Central
Committee, Jeffrey Laurenti,
Howard Kage, Gerald Stockman,
Louise Lomma, Jane Burgio,
W. Cary Edwards, Thomas H. Kean

Appellees

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF THE NATIONAL LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42(3) of the Rules of this Court, The National Legal Foundation respectfully moves the Court for leave to file a brief amicus curiae in the above entitled case. Counsel for Appellees have not replied to movant's letter requesting consent. Appellants have granted their consent.

The National Legal Foundation is an organization devoted to advocacy and support of Constitutional Rights and

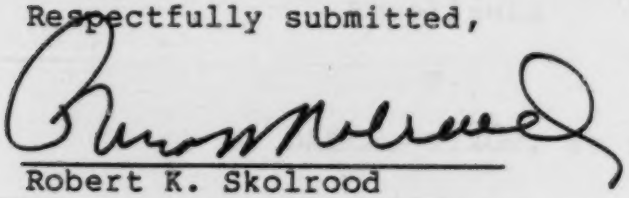
Liberties. In this capacity, The National Legal Foundation is gravely concerned about threats posed to Constitutional freedoms, including the rights of people to participate in the electoral process without discrimination and thus to preserve a republican form of Government. The Court's disposition of this case could dramatically affect those freedoms. Briefly stated, the principal issue at stake in this controversy involves the rights of a candidate for national office to appear on the primary ballot on an equal footing with other candidates. In particular, the case involves an alleged subterfuge by the defendant Mercer County Democratic Central Committee to avoid the strictures of election law and violate Plaintiffs/Appellants' Constitutional rights. This appeal, however, precisely focuses on the issue of Federal Court jurisdiction. The court below, affirmed on appeal, granted a Motion to Dismiss, based apparently on a conclusion that there was insufficient Federal subject matter jurisdiction. This is the central issue of the brief supplied herewith by The National Legal Foundation as amicus curiae. In short, the Federal District Court should be directed to recognize Federal jurisdiction in this matter for the reasons set forth in the brief.

Counsel of Record for amicus curiae Robert K. Skolrood is Executive Director for The National Legal Foundation and Paul S. McConnell is staff counsel for that organization. Counsel for amicus curiae specialize in Constitutional litigation and have participated in significant cases relating to First Amendment and other constitutional freedoms.

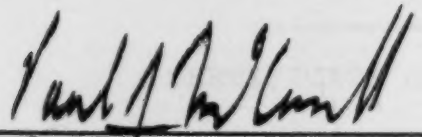
CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying amicus brief in the present case in support of the position of the Appellants.

Respectfully submitted,



Robert K. Skolrood



Paul S. McConnell

Attorneys for The National Legal Foundation

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NO. 86-1079

STEPHEN A. KOCZAK, et al,

Appellants

v.

G. DALLAS DIXON, et al

Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of Jan. 28, 1987, three copies of the Brief of Amicus Curiae, and a copy of the Motion for Leave to File Brief of Amicus Curiae and Statement Concerning First Class Mailing, were sent by first class mail with postage prepaid to each of the following pursuant to S. Ct. Rule 28.5(b):

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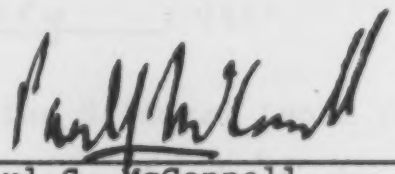
I further certify that service is not required on any other persons, and that all parties required to be served have been served as required under S. Ct. Rule 28.



Paul S. McConnell
Attorney for Amicus Curiae
The National Legal Foundation

STATEMENT CONCERNING FIRST CLASS MAILING
(Pursuant to Rules 28.2 and 28.5)

I hereby affirm that the enclosed Brief of Amicus Curiae was deposited in a United States Post Office or mailbox, with first class postage prepaid and properly addressed to the Clerk of this Court, on January 28, 1987, which was within the time allowed for filing; and that I am a member of the Bar of this Court.

Subscribed this 28th day of January, 1987.

The National Legal Foundation

By: Paul S. McConnell
Paul S. McConnell

Subscribed and Sworn before
me this 28th day of
January 1987.

Notary Public

My Commission Expires: April 23, 1989

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INTEREST OF AMICUS CURIAE

The National Legal Foundation is gravely concerned about threats posed to constitutional freedoms, including the rights of the people to participate in the electoral process without discrimination and thus to preserve a republican form of government. The Court's disposition of this case could dramatically affect those freedoms.

The National Legal Foundation is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights and other inalienable liberties.

Counsel of record for amicus curiae, Robert K. Skolrood is Executive Director and Paul S. McConnell is Staff Counsel for The National Legal Foundation. Counsel for amicus curiae specialize in constitutional litigation and have

participated in significant cases relating to First Amendment and other constitutional freedoms.

The National Legal Foundation believes the expertise of its attorneys will be of assistance to the Court in this case.

ISSUE PRESENTED

Whether the district court wrongly dismissed plaintiffs' complaint on the grounds of lack of federal jurisdiction where plaintiffs have alleged a violation of their rights under 42 U.S.C. 1983 the Equal Protection and Privileges and Immunities clauses of the 14th Amendment?

SUMMARY OF ARGUMENT

Federal jurisdiction in this case is manifest. The District Court was in error

in granting Defendants'/Appellees' motion to dismiss based on a failure of cognizable subject matter jurisdiction. Jurisdiction exists, however, and is based on 28 U.S.C. 1331 and 42 U.S.C. 1983. Both sections, in turn, require a violation of constitutional rights or other statutory privilege. The rights contravened by Appellees' actions and inactions as alleged in Plaintiffs'/Appellants' complaint include Appellants' Equal Protection rights and Privileges and Immunities of U.S. citizenship. Furthermore, the state statutes and standards implicated are in fact federal election law per Article I Section 4 of the U.S. Constitution. Hence, a violation of these standards is, in effect, a violation of federal law and further substantiates federal court jurisdiction.

STEPHEN A. KOCZAK, et al.

Appellants

v

G. DALLAS DIXON, et al.

Appellees

ARGUMENT

I.

STATUTORY BASIS OF FEDERAL COURT JURISDICTION

Appellants, Plaintiffs below, invoked Federal Court subject matter jurisdiction pursuant to 28 U.S.C. 1331 and 42 U.S.C. 1983, inter alia. The object of this Amicus brief is to address the District Court's surprising manifest rejection of

subject matter jurisdiction.[1] Despite the clarity of the pleadings and oral argument, Judge Cowen succinctly stated in his Opinion (see, Appellants' Appendix 1-1 et seq.) "I fail to see how he [plaintiff], as has stated, a claim under federal law upon which relief can be granted." He thereupon denied Plaintiffs' Motion for Preliminary Injunction and granted Defendants' Motion to Dismiss.

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[1] 42 U.S.C. 1983 provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. 1331, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Both U.S. statutes above cited grant Federal Courts subject matter jurisdiction based on constitutional claims. Section 1331 of course grants original jurisdiction to Federal Courts and Section 1983 provides the federal statutory vehicle. The 1983 action must be grounded on an alleged deprivation of "rights, privileges, or immunities secured by the Constitution and laws...." Therefore, the question common to both, and thus at the heart of the dispute, is whether any such deprivation has been adequately pleaded. If so, the District Court is bound to exercise its original jurisdiction. Bell v. Hood, 327 U.S. 678 (1946). This the court refused to do, requiring Appellants/Plaintiffs to pursue vindiction of their state statutory violations in state court, apparently the only

justiciable matter in the court's mind.[2] The District Court's failure to recognize the federal rights and privileges at stake in this case as cognizable before a Federal Court is the basis of appeal herein.

II.

APPELLANTS HAVE RAISED SUFFICIENT CONSTITUTIONAL CLAIMS TO SUPPORT FEDERAL COURT JURISDICTION

Incredibly, in a dispute involving issues central to the life and existence of constitutional, democratic government, viz access on an equal basis to elections and qualified candidates, the court below found no grounds for federal

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[2] Judge Cowen further opined: "Not only is there not a likelihood of success on the merits, but quite frankly, there is no likelihood of success, since the Court does not even have jurisdiction in the matter."

jurisdiction.[3] There is a constitutional footing to Appellants' claim, of course, rooted in their Fourteenth Amendment rights and privileges. Thus the district court should have accepted jurisdiction. England v. Louisiana Medical Examiners, 375 U.S. 411 (1964) overruled on other grounds, Allen v. McCurry, 449 U.S. 90 (1980). The gravamen of this action is not the unconstitutionality of state statutes or even a violation of state law per se. That the standard of protection

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[3] Judge Cowen apparently during the hearing had a clear grasp on the plaintiffs' jurisdictional argument which the court elucidated while attempting to enlighten defense Counsel. E.g. The Court: "Well, they say that their... equal protections are being abridged because they are not being treated equally as anyone also who is vying for a position in the primary. And that is a violation of the Fourteenth and First Amendments." See, Appellants Appendix 17-40 to 17-46. Apparently defense Counsel's "sincere beliefs" to the contrary without any authority cited, were persuasive.

is found in part in state law does not convert the federally guaranteed rights into a state issue. Rather, the object of this lawsuit is to preserve Appellants constitutional liberties from Defendants' attack, as provided by the several provisions herein referenced.

One of the reasons §1983 was enacted according to this Court in Monroe v. Pape, 365 U.S. 167, 187 (1961)[4] was the lack of state level enforcement of Fourteenth Amendment rights "by reason of prejudice, passion, neglect, intolerance, or otherwise." This failure involves both defendant state officials and the quasi-statutory Mercer County Democratic Central Committee and related individual

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[4] Monroe was overruled in part on other grounds pertaining to its narrow interpretation of "person" for purposes of Section 1983 by Monell v. New York Dept. of Social Services, 436 U.S. 658 (1978).

defendants. Plaintiffs'/Appellants' complaint sets forth these shortcomings with particularity and should be taken as true for purposes of determining federal court jurisdiction on the motion to dismiss. Los Angeles v. Preferred Communications, Inc. 476 U.S. ____, 90 L.Ed.2d 480, 487 (1986). See especially Complaint Counts V and VI set forth in Appellants' Appendix 8-32. et seq.

1. EQUAL PROTECTION

The nub of Appellants' Constitutional claim is found in the Fourteenth Amendment's Equal Protection Clause.[5] This is not a judicial appeal for political relief.

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[5] "No state shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws."

> The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." Baker v. Carr, 369 U.S. 186, 217 (1962).

In a political context, Appellants have been denied equal protection in their capacities as voters and candidates.

Appellants have not challenged the New Jersey elections laws as themselves being in contravention of constitutional precept. Those statutes are an obvious attempt by the New Jersey legislature to maintain equality among the various primary candidates. Defendants actions as alleged, were designed to precisely override the equal protection mandated by the statutory design.[6] E.g. State law

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[6] In Yick Wo v. Hopkins, 118 U.S. 356, 374, (1885) "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between

proscribes endorsement of any candidate prior to the primary. See, N.J.S.A. 19:34-52 and related statutes gathered at Appellants' Appendix 38-1 et seq.

In the past, the right to vote has been the subject of much comment. In Ex Parte Yarbrough, 110 U.S. 651, 666, 28 L.Ed. 274 (1884), this Court stated:

> "It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people."

In Smith v Allwright, 321 U.S. 649, 662, (1944) the Court recognized the right to vote in a primary was a fundamental right. If this is true in the voting process, a fortiori it should apply to the process whereby the candidates are selected. The court in Williams v.

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persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Sclafani, 444 F.Supp. 906, 911 (1978, S.D.N.Y.), aff'd without op 580 F.2d 1046 (2d Cir. 1978), recognized that:

> "T]he right to appear on the ballot is integral to the right to vote and must be measured by the same test of constitutionality. See, Williams v. Rhodes, 393 U.S. 23, (1968). Candidates have standing to assert this right."

Unquestionably, the policies, practices and omissions of defendants as alleged impinge upon this fundamental right. To the extent Appellants have been wrongly excluded from equal standing during that process, thus being denied their fundamental liberty to run for political office, or denied qualified candidates from which to choose by an in camera procedure, they have been denied the Equal Protection guaranteed them by the 14th Amendment.

The facts in the instant case bear similarily to those in Smith v. Cherry,

489 F.2d 1098 (7th Cir. 1973). In that case, the District Court granted defendant's motion to dismiss for failure to state a claim. Plaintiff therein alleged fraud in the manner in which the Democratic Committee conducted a primary for the 12th Illinois Senatorial District. According to the complaint, defendants fraudulently slated a highly electable candidate for the primary who would step down subsequent to the primary election and be replaced by the Democrats with someone who may have been less electable at the primary level, thereby subverting the electoral process. Plaintiff lost the primary. Plaintiff alleged that had the ultimate party nominee been forced to run against him in the initial primary, plaintiff may have been elected. He invoked jurisdiction under 42 U.S.C. §1983 and the 1st and 14th Amendments seeking declaratory and

injunctive relief. This district court was reversed and remanded by the Seventh Circuit which concluded that the complaint was sufficient to allege a possible Equal Protection violation. Quoting from Shakman v. Democratic Organization, 435 F.2d 267, 270 (7th Cir. 1970), the court reasoned, "The interests of candidates in official treatment free from intentional or purposeful discrimination are entitled to constitutional protection." Cherry p. 1103.

Similarly in the instant case, plaintiffs have alleged violations of their 14th Amendment rights. While the factual setting does not involve exclusion from the party ticket, it alleges the same kind of preclusive political activity which had a powerful discriminatory effect on plaintiffs both as to the right to stand in an equal position with others on a primary ballot, and as voters, to have

an unbiased presentation of the candidates on the ballot.

2. PRIVILEGES AND IMMUNITIES

The Privileges and Immunities clause is especially concerned "with the vindication of important relationships with the Federal Government [e.g.]- voting in Federal elections...." United States v. Guest, 383 U.S. 745, 772 (1966) (Harlan, J. concurring in part). The instant case concerns precisely this right and its corollary, the right to stand for federal office. The right to "share" in federal offices has been recognized as of the essence of privileges and immunites since Crandall v. Nevada, 6 Wall. 36, 18 L.Ed. 745 (1868). This has been

recognized as extending to primary elections in Smith v. Allwright, supra.[7]

Clearly there could be no more significant incident of U.S. citizenship than the rights emanating from the franchise. This, in part, was a basis for the Court's rejection of racially exclusive primaries in Allwright, Id. p. 657. To the extent Defendants' acts and omissions have hindered Appellant candidate from obtaining a fair opportunity to appear before the voters in a primary election relative to federal office, they have transgressed this central privilege of U.S. citizenship. Similarly, with regard to Appellant

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[7] Wherein it is stated, at 661-662: "It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the state, like the right to vote in a general election, is a right secured by the Constitution."

voters, their concommitant privilege of having access to unbiased candidates free from the intimidations of factious insider interests and control is at stake. As with Appellants' other Constitutional arguments, the Privileges and Immunities clause affords a sound basis for the exercise of Federal Court jurisdiction.

3. ARTICLE I SECTION 4

Appellants have argued and continue to argue that the state election laws pursuant to the delegation of authority in Article I Section 4, constitute those state laws as being federal in nature, thus giving rise to Federal Court jurisdiction. Appellants have set forth facts in their pleadings which plainly evince a denial of rights cognizable by Federal Courts. Appellees, on the other hand, are attempting to defend a system reminiscent of England's "rotten boroughs" by which private party elites control

elections apart from any popular oversight. This framework the Constitution's framers expressly rejected in Article I Section 4 which provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article I Section 4 acknowledges that the best locus of supervision in a federal election should be at the state level. However, recognizing the potential for corruption, the framers wisely retained for the government of the Union the ultimate authority for oversight and control. Thus, for purposes of federal elections, state governments and their positive law are uniquely the agents of the national. In this sense, state election laws are federalized by constitutional design. Hence, their

violation gives rise to Federal Court jurisdiction as "arising under" the laws of the United States. 26 U.S.C. 1331. This is no abrogation of Federalism, but as Jay, Wilson and Hamilton, inter alia, recognized it was of the essence for the preservation of the nation.[8]

This Court has recognized further that to the extent the state government delegates a portion of that authority to political parties, those parties become agencies of the state, Allwright, supra

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[8] Wilson: "This, Mr. President, is not only a proper, but a necessary power, for every government should possess the means of self-preservation. 2 JENSEN, THE DOCUMENTARTY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 405-6.

Jay: "Congress should have power, by law, to support the government, and prevent the dissolution of the Union." 2 ELLIOT 326.

Hamilton: "Every government ought to contain in itself the means of its own preservation..." FEDERALIST PAPERS, No.59.

p. 663, and thus are themselves subject to federal law to the extent they violate constitutional rights. The danger of such delegation is manifest as in this case where by subterfuge the restraints of state statutory law governing elections have been evaded. The only question, therefore, is whether there has been a violation of Constitutional right or federalized state law in the de facto primary procedures.

III.

CONCLUSION

These issues are manifestly federal in their significance and import. 42 U.S.C. 1983 provides for the vindication of such civil rights before the federal courts, and 28 U.S.C. 1331 grants original federal court jurisdiction. The decisions below have

effectively barred Appellants from the exercise of their federal electoral rights and their protection in federal courts. This Court, therefore, should accept the Appeal and note jurisdiction.

Respectfully Submitted,

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Paul S. McConnell

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MOTION FILED
JAN 29 1987

(5)

No. 86-1079

IN THE

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STEPHEN A. KOCZAK, KATHERINE E. ROTTER, and JOHN G. RESCH,

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Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CENTER FOR JUDICIAL STUDIES, IN SUPPORT OF APPELLANTS

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No. 86-1079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STEPHEN A. KOCZAK, KATHERINE E. ROTTER, and JOHN G. RESCH,

Appellants,

v.

G. DALLAS DIXON, THE MERCER COUNTY DEMOCRATIC CENTRAL COMMITTEE, JEFFREY LAURENTI, HOWARD KAYE, GERALD STOCKMAN, LOUISE LOMMA, JANE BURGIO, W. CARY EDWARDS, and THOMAS H. KEAN,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE CENTER FOR JUDICIAL STUDIES, IN SUPPORT OF APPELLANTS

Pursuant to Rule 36.1 of the Rules of this Court, the Center for Judicial Studies respectfully moves for leave to file the annexed brief *amicus curiae* in support of appellants. Appellees have refused consent for the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The Center for Judicial Studies is a non-profit civic and educational organization concerned with fundamental issues respecting the Constitution of the United States and the operation of the courts. Affiliated with it are over two dozen constitutional scholars, law professors, attorneys, and other experts who assist the Center in performing its research and public-education functions. The Center publishes the bi-monthly magazine *Benchmark,* and supports the production of books, monographs, and occasional papers focussing on constitutional issues. In the past, the Center has submitted briefs *amicus curiae* in other cases involving questions of constitutional law, including *Wallace* v. *Jaffree,* —— U.S. ——, 105 S.Ct. 2479 (1985).

The Center is concerned with the instant appeal because, unless overruled here, the decision of the District Court, as affirmed by the Court of Appeals, will substantially subvert the democratic process in the State of New Jersey, draw into question the legitimacy of representation of that State in the Congress of the United States, and encourage illegal manipulation of the electoral systems in other States and Commonwealths throughout this nation. Thus, this appeal presents an issue of constitutional law basic to the continuance of republican government, and to the role of the courts as guardians of the integrity of that institution.

PURPOSE OF THE BRIEF *AMICUS CURIAE*

The Center recognizes that appellants have fully and ably argued their own personal interests in having this Court take jurisdiction of the appeal. Yet, by naturally emphasizing their particular circumstances, appellants may not have illuminated the stark illegality of the District Court's claim that the federal judiciary is impotent to enforce the requirements of Article I, Section 4 of the Constitution. Through its annexed brief *amicus curiae,* the Center hopes to provide this Court with a broader perspective on that fundamental jurisdictional issue, and on the pressing need for this Court to hear the appeal.

WHEREFORE, the Center prays that this Court grant its motion, and permit the filing of the annexed brief *amicus curiae.*

Respectfully submitted,

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On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR JUDICIAL STUDIES, IN SUPPORT OF APPELLANTS

Pursuant to a motion for leave to file under Rule 36.1 of the Rules of this Court, the Center for Judicial Studies files this brief *amicus curiae* in support of appellants.

INTEREST OF THE *AMICUS CURIAE*

The interest of the Center as *amicus curiae* appears in its motion for leave to file this brief, *ante*.

ARGUMENT

Article I, Section 4 of the Constitution of the United States provides in pertinent part that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof". This section impliedly creates a fundamental federal constitutional right for all candidates seeking election to the Congress, and for all voters desirous of supporting such candidates, to participate in an electoral process the manner of which is "prescribed in each State by the Legislature thereof".

In the State of New Jersey, the legislature has provided for the election of official "county committees of political parties",[1] and decreed that "[n]o * * * county * * * committee of any political party shall prior to any primary election endorse the candidacy of any candidate for a party nomination.".[2] Thus, in New Jersey, every candidate for congressional office, and every voter supporting such candidate, has a federal constitutional right derived from Article I, Section 4 to complain of any endorsement of a rival candidate by a "county * * * committee of [his] political part[y] * * * prior to any primary election". If a county committee abridges this right by violating New Jersey

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[1] N.J. Stat. Ann. 19:5-3.

[2] N.J. Stat. Ann. 19:34-52.

law, the candidate and voters supporting him have a clear cause of action under the federal civil-rights laws.[3]

Here, appellants Koczak (a candidate for the House of Representatives) and Rotter and Resch (voters supporting him) alleged that appellees have created and operated a so-called "central committee" that: (i) for all relevant constitutional purposes is the *alter ego* of the official county committee; and (ii) openly endorses candidates for party nominations prior to the primaries. If appellants' charges are factually correct, appellees are in clear violation of New Jersey law[4]— and, derivatively, have infringed appellants' federal constitutional rights under Article I, Section 4, as well. On the face of their complaint, then, appellants have stated a classic claim for relief under the civil-rights laws.

Yet, amazingly, the District Court dismissed appellants' complaint for want of subject-matter jurisdiction; and the Court of Appeals affirmed without comment. If these courts are correct, then Article I, Section 4 is, for all practical purposes, an impotent exhortation, leaving the federal government powerless to protect its own citizens' participation in the election of Senators and Representatives. Self-interested or corrupt local officials may (as they are alleged to have done here) simply set aside, circumvent, or pervert the electoral statutes and regulations "prescribed in each State by the Legislature thereof", immune from federal judicial scrutiny.

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[3] 42 U.S.C. §§ 1983 *et seq.*

[4] *See* Cavanaugh v. Morris County Democratic Comm., 121 N.J. Super. 430 (Ch. 1972).

If the federal government cannot effectively police the constitutional regularity of elections to Congress at the instance of candidates and voters aggrieved by local officials' practices patently impermissible under applicable state laws, then those officials enjoy an effective license to nullify Article I, Section 4 *pro tanto*—undermining the legitimacy of the entire congressional electoral process, and with it the legislative process that those elections exist to serve.[5] This result is as intolerable as a matter of constitutional theory, and impossible as a matter of political praxis, as it was incapable of coherent justification by the District Court or the Court of Appeals. Indeed, if anything, the result below carves in stark relief those courts' abdication of judicial duty in the face of a situation that threatens the very foundation of republican government.

Under these circumstances, both the substantiality of the question involved in this appeal and the irresponsibility with which the lower courts have addressed it heretofore compel this Court's review.

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[5] The spurious reasoning of the District Court would also apply to election of the President. For Article II, Section 1, Clause 2 provides in pertinent part that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" to select the President. And under the District Court's notion that the federal judiciary lacks jurisdiction to intervene in state elections the "Manner" of which the state has prescribed, corrupt local officials could exercise a *pro tanto* power of nullification over that Article, too.

CONCLUSION

For the foregoing reasons, this Court should notice the appeal and order full briefing and oral argument. In the alternative, this Court should issue a writ of certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Brief of Amicus Curiae

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INTEREST OF AMICUS CURIAE

The interests of the authors of this Amicus Curiae brief are that they received Bachelor of Arts degrees from Princeton University, where they studied under the same educational system under which John Witherspoon, sixth President of Princeton University (1767-1794), taught James Madison, (Class of 1771 and later fourth President of the United States.) James Madison returned to Princeton University in 1772 to read Theology and Ethics, among other things, under the President's supervision. See Princeton University Library Chronicles, Vol. 22, No.3, Spring, 1961, from an article by James H. Smylie, "Madison and Witherspoon: Theological Roots of American Political Thought," at p. 120. Princeton alumnus Madison was one of the principal authors of the United States Constitution and the preeminent

authority of his day on Article I, Section 4, Clause 1, the "Times, Places and Manner" Voting Clause, which is the crux of this case.

Whereas the authors of this brief have studied the law and have profound respect for it, they wish to explain succinctly what they believe to be the intention of Madison in making his authorship contribution to the U.S. Constitution, which they trust will be helpful to this Honorable Court in resolving this case in favor of jurisdiction at this preliminary stage.

The authors of this brief wish to clarify the fact that the views expressed hereinbelow are theirs alone and not those of Princeton University, its officials, nor of any of the other alumni of that University.

The authors hereby express their thanks to Earl Coleman, Archivist, and Emily Bennett, Office of Public Information, of Princeton University for their assistance with respect to information regarding Madison's years at Princeton University.

SUMMARY OF ARGUMENT

1. Where the lower court purports to have found no case law controlling a controversy involving constitutional rights, which is the situation in the case at bar, the lower court is obliged to review the intent of the framers of the Constitution in deciding whether it has jurisdiction but failed to do so in this instance.

2. The New Jersey anti-endorsement statute, N.J.S.A. 19:34-52, protects the citizen and his right to participate in nominating candidates. This right, once prescribed by the state's legislature and

applied to primaries of races for the National Congress, is guaranteed to the citizen by Art.I, Sec.4, Cl.1 and to permit political parties to screen and endorse candidates denies each voter his or her right to vote for an otherwise duly qualified candidate for Congress in the manner so prescribed.

3. For the Court to fail to grant jurisdiction in this matter is to deny for all intents and purposes the right of voters in the State of New Jersey to participate in the electoral process which is so fundamental to the American political system, as expressed by James Madison and John Witherspoon.

ARGUMENT

1. It is always incumbent upon a lower court to consider intent of its framers in interpreting a law. A law remains a law until changed or revoked. Judicial history is always to be considered and for

a judge not to consider it is for the judge to shirk his judicial oath and responsibilities set forth in Art.VI, Cl.3 to uphold the Constitution. This is even more strongly the case where, as here, the "judicial" history is the history of the Constitution itself as the paramount law pursuant to the "Supremacy Clause" of Art. VI, Cl. 2.

In this instance where there is no exact case which the lower court was willing to consider as on point, the lower court was duty-bound to consider the intent of the framers of the Constitution. This particularly includes consideration of the pronouncements of James Madison as they bear on the interpretation of the issues raised. To leave this decision standing would be erroneous.

2. In reviewing and interpreting a New Jersey law <u>used to regulate a federal matter</u> we urge this Court to find

jurisdiction and to apply the checks and balances of the Federal law set forth in the Constitution, which is best explained in Madison's remarks to Monroe that:

> It was found impossible to fix the time, place and manner of election of representatives in the constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity and to prevent its own dissolution.
> ...
> Were they exclusively under the control of the state goernments, the general government might easily be dissolved. (emphasis added) Farrand, Records of the Federal Convention, Vol. 3, p. 311. Also see U.S. v. Gradwell, 243 U.S. 476, at 484

Whereas Thomas Jefferson favored explicit laws guaranteeing and detailing the rights of individual citizens of the new Republic, which is a reflection of his experience under the French Civil Code while in France following the War of Independence, James Madison favored the

establishment of institutions through federal law to serve as checks and balances on the states, disestablishing the states from an undue concentration of power or authority which would deny to the citizens those inherent rights which, in the view of both these men and all the other framers, they possessed. Nowhere was Madison more concerned about such an undue concentration of power than with respect to the guarantee of the right to vote for the members of the National Legislature as set out in Art.I. He saw the lack of such guarantee as the basis of the dissolution of the federal government as it was established by the framers in the Constitution. The National Congress was created by the Constitution and he well realized that without checks upon the power of the state and the "general" government, as he called it, to infringe upon that right, it would ultimately be

dissolved. He viewed this right clearly as a federal matter. Therefore, the allegation of infringement of this right is a federal matter, even though the statute protecting the right be a state enactment pursuant to Art.I, Sec.4, Cl.1.

The failure of the Court to recognize jurisdiction in this matter will, we submit, set the stage for the dissolution apprehended and forewarned against by James Madison should the courts of state government have exclusive jurisdiction over these matters.

3. To deny the right of a duly qualified candidate to appear on a primary ballot free of the stigma of not being endorsed where the state's legislature has forbidden such endorsement, is to deny all voters the chance to view such a candidate impartially and fairly as contemplated by the anti-endorsement law.

The net result of the New Jersey endorsement process by the Democratic Party officials in this case is to short circuit the entire voting process which the elected representatives of the legislature have prescribed. Whether by the endorsement process in the case at hand or other similar voting gimmicks and schemes recently before this Court, such as in the cases of Hopfmann v. Connolly, No. 85-1097, ___U.S.___, App. Den., Cert. Den., January 12, 1987 and Eu v. San Francisco Democratic Central Committee, No. 86-434 ___U.S.___, jurisdiction noted, decision of the lower court vacated and remanded to the 9th Circuit for decision in light of the recent decision of this Court in Tashjian v. Republican Party of the State of Connecticut, No. 85-766, ___U.S.___, dec. Dec. 10, 1986, (dec. in Eu also January 12, 1987,) the endorsement or prescreening process to date has never

permitted other names to appear on the ballot on an equal footing with the party favorite.

The system being questioned by this case raises issues similar to those found in Germany in the early 1930's. Moreover, in January of 1987, the Soviet Union, a state in which such party regulatory control has a status equal to and often superior to that of the legislative bodies, has questioned similar practices and procedures within its own party apparatus as being overly stifling and counter-productive to its national interests (See N.Y. Times, January 28, 1987, p.1) If the United States' form of government stands for anything it stands for the concept of determination along lines of "one person, one vote" and the concept that having "we the people" make decisions, acting through those whom we elect in fair and open contest, is better

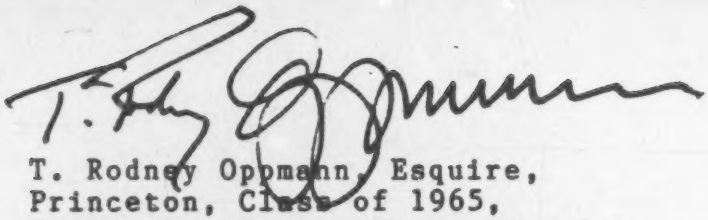
than regulatory decision-making by a limited number of largely unknown party officials who are not as representative of the popular will as legislators.

CONCLUSION

We submit that Madison intended the Art.I, Sec.4, Cl.1, "Times, Places and Manner Clause" as a check and balance clause precisely for a situation such as the case at hand and that his intent prevailed in the inclusion of that clause in the Constitution by its Framers and remains the law to this day. To fail to grant federal jurisdiction in this case would be to dishonor his efforts and the clear intent of the Framers of the Constitution in installing a most important bulwark against dissolution of the Federal Union.[1]

---

[1] In its decision in Tashjian, supra, a majority of this Court made it clear, (p.15, n.13) that a State has a right to confine each voter within a party to a single nominating act if it so desires. The New Jersey statutory scheme, as



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(Cont.)_____
interpreted by the New Jersey courts in the cases cited in appellants' jurisdictional statement, is clearly intended to do that. The effect of the systematic violation of the anti-endorsement law is to allow certain party members who attend the endorsing and screening convention to participate in more than a single such act. Moreover, this extra nominating act, being pursuant to a claimed First Amendment right, is beyond the purview of the legislature and thus violates this recent ruling of the Court. Unless the federal jurisdiction over the matter is recognized where congressional races are concerned, such violation of an acknowledged right of the States can also be a step enabling the dissolution of the Union warned against by Madison. For where the practice of evading the statute has been tolerated on the local level, access to the federal courts is a necessary concommitant to the reserved power in Congress to step in and regulate congressional elections when thought necessary in the national interest. In other words, federal judicial oversight is as necessary as federal legislative oversight in order to prevent the dissolution which was the root of the Framers' concern.

STATEMENT OF ASSENT TO FILING OF AMICUS CURIAE BRIEF

The Amici are informed that counsel for the parties have assented to the filing of this and other Amicus briefs.

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing Brief of Amicus Curiae have been served upon all counsel named in the opening brief of appellants by service by United States Mail, First Class, postage prepaid, this 30th day of January, 1987, to wit: Laurence A. Elgin, Esq. 2762 Woodley Place, NW Washington, D.C. 20008; Joseph F. Shanahan, Esq., Box 105, RD 2, Lambertville, N.J. 08530; Donna Kelly-Boccher, Esq., Dep. A.G., Hughes Justice Complex, CN 112, Trenton, NJ; Lenin I. Fishman, Esq., 150 West State Street., Trenton, N.J., 08608; Barry D. Szaferman, Esq., 640 S. Broad St., Trenton, N.J., 08608; Walter R. Bliss, Jr., Esq., 126 Wall Street, Research Park, Princeton, N.J. 08540; John J. Hoagland, Esq., 303 George St., 3d Fl., New Brunswick, N.J. 08901; John C. Sahradnik, Esq., 212 Hooper Avenue, P.O. Box 757, Toms River, N.J. 08753.

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